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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 12, 1937
CERTIORARI GRANTED NOVEMBER 15, 1937

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court for the Eastern District of

No. 17984. March Term, 1934

UNITED STATES OF AMERICA

vs.

ROBERT K. WURTS

Charles D. McAvoy, Esq., for Plaintiff. Duane, Morris & Heckscher, Esqs., for Defendant.

Docket entries

1934

Apr. 26.—Praecipe to issue Summons filed.

" " Summons exit—returnable 1st Monday in June, 1934.

May 1.—Summons returned on April 27, served and filed.

2 " 24.—Appearance of Duane, Morris & Heckscher, Esqs., for defandant filed.

Oct. 3.—Statement of Claim with notice to file affidavit of defense filed.

" 16.—Petition for rule to show cause why more specific statement of claim should not be filed and Order of Court granting rule, filed.

" 29.—Argued sur Rule for more specific Statement of Claim—In open Court Rule Absolute.

Nov. 10.—Amended Statement of Claim with notice to file affidavit of defense, filed.

" 23.—Affidavit of Defense raising questions of law filed.

Dec. 10.—Praecipe to place case on Argument List filed.

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Mar. 20.—Opinion, Dickinson, J., granting leave to file supplemental affidavit of defense in 15 days filed.

Apr. 2.—Supplemental Affidavit of Defense, New Matter and Notice to file reply to New Matter, filed.

" 24.—Motion for judgment for want of sufficient affidavit of defense and Order of Court granting rule to show cause etc., filed.

May 25.—Argued sur rule for judgment for want of sufficient affidavit of defense.

Aug. 28.—Opinion, Dickinson, J., finding for defendant filed.

3 Oct. 9.—Motion by defendant for leave to withdraw Supplemental Affidavit of Defense filed.

" 9.—Order of Court directing that Supplemental Affidavit of Defense be marked withdrawn, vacating order overruling statutory demurrer, and sustaining demurrer and entering judgment for defendant filed.

1937

Jan. 4.—Plaintiff's exception and Order of Court allowing same filed.
" 4.—Petition for Appeal and Order of Court allowing appeal filed.
" 11.—Assignments of error filed.
" 11.—Citation allowed and issued.
" 11.—Copy of Notice of Appeal filed.
" 11.—Praecipe for transcript of record filed.
" 25.—Citation returned "service accepted" and filed.

In United States District Court

Plaintiff's statement of claim.

Filed Oct. 3, 1934

And Now comes the United States of America by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, who prosecutes this action for and on behalf of the United States of America, and for cause of complaint against the above named defendant, alleges as follows:

1. That at all times herein after mentioned the claimant has been and now is a corporation sovereign and body politic.

2. That the defendant, Robert K. Wurts, was at all times hereinafter mentioned and is now, a citizen and resident of Philadelphia County, Pennsylvania, which is within the jurisdiction of this Court.

3. That this is an action by the United States of a civil nature at law arising under the Internal Revenue Laws of the United States, instituted at the request of the Commissioner of Internal Revenue and is authorized and sanctioned by the Attorney General of the United States.

4. That on or about April 30, 1932, and within two years prior to the institution of this action the plaintiff, through its Commissioner of Internal Revenue, by error, paid to the defendant the sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37) as a refund to defendant upon income taxes previously paid by him for the calendar year 1929; said refund being the amount paid to the taxpayer on account of an erroneously allowed deduction or exclusion from the reported income of said taxpayer in the sum of Twenty-one Thousand Eight Hundred Thirty-five Dollars and Eighty-seven Cents ($21,835.87) from the previously reported income of said taxpayer (as increased by a previously omitted item of income of Two Hundred and Fourteen Dollars ($214.00), of Ninety-four Thousand Two Hundred Seventy-nine Dollars and Fourteen Cents ($94,279.14), upon which a tax of Seven-

teen Thousand Two Hundred and Thirty-nine Dollars and Ninety Cents ($17,239.90) had theretofore been paid.

5 That the defendant received of and from the plaintiff said sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37) through inadvertence, error and mistake, as aforesaid, but without bad faith on his part or intent to defraud plaintiff; that he retained said sum which plaintiff claims.

Wherefore, the retention by the defendant of this refund against the demand of the plaintiff is wrongful and unlawful, and the plaintiff is entitled to judgment in the sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37), together with interest thereon at six per cent per annum from the date of payment of said refund and the costs of this action.

(s) CHARLES D. McAVOY,
United States Attorney.

[*Duly sworn to by Charles D. McAvoy; jurat omitted in printing.*]

6 In United States District Court

Order granting rule to show cause

Filed Oct. 16, 1934

Before DICKINSON, J.

And now, to wit, this 16th day of October, A. D. 1934, upon consideration of the within petition, and upon motion of Duane, Morris & Heckscher, Esquires, Attorneys for Petitioner, the Court grants a rule on the plaintiff to show cause why a more specific Statement of Claim should not be filed in the above cause. Returnable Oct. 29, 1934 at 10 a. m.

By the Court.

Attest:

GEORGE BROBECK, *Clerk.*

7 In United States District Court

Petition in support of rule for a more specific statement of claim

Filed Oct. 16, 1934

To the Honorable, the Judges of said Court:

The petition of Robert K. Wurts respectfully represents:

That he is the defendant in the above entitled action, in which a copy of Plaintiff's Statement of Claim is attached to this petition as "Exhibit A", and that said Statement of Claim is not sufficiently specific so as to enable this defendant to answer the same, for the following reasons:

1. Paragraph 4 of the Statement while alleging that on or about April 30, 1932, and within two years prior to the institution of this action, the plaintiff by error paid to the defendant Four thousand five hundred thirteen dollars and thirty-seven cents ($4,513.37) as a refund to defendant, fails to allege specifically upon what date said refund was in fact made or certified by order of the Treasury Department, acting through the Collector of Internal Revenue, or from what date interest was allowed or included in said amount alleged to be refunded.

2. Plaintiff's Statement of Claim while alleging that the refund was an amount paid to the defendant taxpayer on account of an erroneously allowed deduction or exclusion from the reported income of the taxpayer, and that the defendant received from
8 the plaintiff said amount through inadvertence, error and mistake, fails to allege in what respect, and under what circumstances, said deduction was erroneously allowed, or through what inadvertence, error and mistake the defendant received the amount alleged to have been paid him by the Treasury Department.

Your petitioner therefore prays that a rule issue to show cause why the plaintiff should not file a more specific Statement of Claim.

DUANE, MORRIS & HECKSCHER,
By (s) ARCHIBALD T. JOHNSON,
Attorneys for Robert K. Wurts, Defendant.

[*Duly sworn to by Robert K. Wurts; jurat omitted in printing.*]

9 *Exhibit A to petition*

[Omitted. Printed side, page 3 ante.]

12 In United States District Court

Amended statement of claim

Filed Nov. 10, 1934

And now comes the United States of America by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, who prosecutes this action for and on behalf of the United States of America, and for cause of complaint against the above named defendant, alleges as follows:

1. That at all times hereinafter mentioned the claimant has been and now is a corporation sovereign and body politic.

2. That the defendant, Robert K. Wurts, was at all times hereinafter mentioned and is now, a citizen and resident of Philadelphia County, Pennsylvania, which is within the jurisdiction of this Court.

3. That this is a suit at law of a civil nature, arising in connection with the administration of the law of Congress providing for internal revenue, and this action is commenced and maintained at the

request of the Commissioner of Internal Revenue and sanctioned and under the direction of the Attorney General of the United States.

4. That the defendant Robert K. Wurts is the widower of Katherine N. Wurts, and that under the provisions of the testator's will defendant was to receive as beneficiary certain net income.

5. That the defendant accepted the terms of said will, and
13 the year involved (1929) received income from the trustee under the trust so created by said will.

6. In accordance with the provisions of an Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue, and for other purposes," approved May 29, 1928, c. 852, 45 Stat. 791, which is hereinafter referred to as the Revenue Act of 1928, the defendant Robert K. Wurts, on or about March 15, 1930, filed with the Collector of Internal Revenue for the First Collection District of Pennsylvania individual income tax on Form 1040 for the calendar year 1929.

7. On the return so filed, the defendant, Robert K. Wurts, reported a net income of $94,065.14 and a tax to be due thereon of $17,195.14, which tax was duly paid.

8. Thereafter, an audit was made of the defendant's 1929 return, and as a result thereof the Commissioner of Internal Revenue erroneously determined that the defendant's reported net income was overstated in the amount of $21,835.87, representing the amount received by him as beneficiary of the trust created under the will of his wife, for the reason that the amount so deemed to be a capital expenditure of the trust applied in excess of the defendant's statutory rights in the estate of his wife, and not equal to or in excess of the value of his aforesaid statutory rights. Said determination was erroneous and illegal for the reason that the Commissioner of Internal Revenue was without authority to so compute defendant's tax.

9. Thereafter an overassessment certificate issued as of Sched-
14 ule IT-46030, dated March 15, 1932. Said certificate of overassessment was based upon the holding as set out in paragraph 8 above.

10. As a result of said overassessment, certificate check dated April 30, 1932, in the amount of $4,513.37 was mailed to the taxpayer, although defendant was not legally entitled to the tax above referred to, and the taxes described in paragraph 7 hereof have been properly levied by the plaintiff, and said adjustment was erroneous and illegal.

11. That by virtue of the examination and erroneous action of the Commissioner of Internal Revenue in making the adjustment hereinbefore set out, and his allowance of defendant's claim for exemption and refund of his tax, the sum of $4,183.77 together with interest thereon in the amount of $329.60, making a total of $4,513.37, was mistakenly and unlawfully paid out of the Treasury of the United States to the defendant when the same did not belong to him, and the defendant, although liable to repay the said sum of $4,513.37,

has refused to do so and still refuses to repay to the plaintiff said sum or any part thereof, although it has been duly demanded.

Wherefore, plaintiff prays judgment against the defendant, Robert K. Wurts, for the sum of $4,513.37, together with interest according to law from April 30, 1932, and for the costs of this action.

CHARLES D. MCAVOY,
United States Attorney.

15 [*Duly sworn to by Charles D. McAvoy; jurat omitted in printing.*]

In United States District Court

Affidavit of defense raising question of law

Filed Nov. 23, 1934

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Robert K. Wurts, being duly sworn according to law, de-
16 poses and says that he is the defendant above named and that the Amended Statement of Claim filed by the United States of America as plaintiff in the above is not sufficient in law, for the following reason:

The Amended Statement of Claim while claiming to recover a refund of Four thousand, five hundred thirteen dollars and thirty-seven cents ($4,513.37), shows on its face that suit was not brought before the expiration of two (2) years after the making of the refund, in that the certificate of over-assessment was issued to defendant on March 15, 1932, and as appears from the Statement of Claim, credit was set up in defendant's favor on that date, whereas the suit was brought, as appears by the record in this case, on April 26, 1934.

(Robert K. Wurts.)
(Signed) ROBERT K. WURTS.

Sworn to and subscribed before me this 20th day of November, A. D. 1934.

[SEAL] (Signed) A. A. JONES, *Notary Public.*

My commission expires Jan. 18, 1935.

17 In United States District Court

Opinion sur statutory demurrer

Argued March 18th, 1936

Filed March 20, 1936

DICKINSON, J., March 20th, 1936.

The question has been discussed as one of the limitation of actions. The difference may be no more than verbal but we do not think the

question one of limitations. It is one of the conditions of the cause of action. The action is to recover moneys voluntarily paid but afterwards discovered to have been erroneously paid to a taxpayer. No right of action would exist without a statute. The Act of Congress gives a cause of action and a right of action, if a distinction exists between the two, upon the terms that the action be brought within two years of the date mentioned in the Act. The distinction between a limitation and a condition, as above outlined, has importance. If a litigant has a cause of action but the assertion of it is subject to a Statute of Limitation, the limitation is a defense which must be pleaded. If, however, the requirement that the action be brought within the limit of time is a condition of the right of action then no right of action exists unless there has been a compliance with the limitation. The absence of it is in consequence a proper subject of a demurrer. The Act of Congress which gives this cause of action gives it on the terms that the action be brought within two years "after the making of" the refund sought to be recovered.

In the process of "refunding" a tax erroneously paid
18 there are several successive steps. The like comment applies to the act of determining that the "refunding" was erroneous. The final step in the "refunding" of a tax found to have been erroneously paid is the payment to the tax payer of the sum found to have been paid by him in excess of the tax sum which he owed. The first step in the recovery of a "refund" erroneously paid is the determination of the fact that it was paid in error. The final step is the bringing of the action to recover what had thus been erroneously paid.

Section 1104 of the Revenue Act of 1932 defines what is meant by the date of the allowance of the "refund." This date is defined to be "the date on which (the Commissioner) first signed (the schedule of over assessment) shall be considered as the date of allowance or refund or credit in respect of such tax. It will be noted that the one section which gives the cause of action uses the phrase "the making of such refund." The other section just referred to defines the date as "the date of allowance of refund or credit in respect to such tax." In the administration of legal justice, it is, at least usually, more important to have the law determined than it is to have it correctly determined. A wrong judgment of what the law is may be accepted and acted upon but uncertainty as to what the law is leaves the law unknown. To quote (from memory) a famous judicial utterance "bad laws can be borne but a vadum aut incertum law cannot be endured."

Applied to the facts of this case, if the question before us is determined one way or the other the interpretation may be accepted and acted upon even although it may be thought to be erroneous.

The case of Paulson vs. U. S., 78 Fed. Rep. (2d),
19 97, is authority for the conclusion that the instant action was brought in time.

A very forceful and elaborate argument has been addressed to us to lead us to the conclusion that the judgment in the Paulson case was erroneous. The full weight of this argument is felt but it does not change the fact that the cited judgment was rendered. The ruling is by the Circuit Court of Appeals for the Tenth Circuit. In the absence of any conflicting ruling by the Court of this Circuit or by the Supreme Court, the cited case is authoritative, and one which we feel bound to follow.

The question of law raised is accordingly ruled against the defendant who has leave to file a supplemental affidavit of defense to the averments of fact of the statement of claim within fifteen days.

In United States District Court

Supplemental affidavit of defense

Filed April 2, 1936

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Robert K. Wurts, being duly sworn according to law, deposes and says that he is the defendant above-named and that he has a just, true, full and legal defense to the plaintiff's claim, the nature and character of which is as follows, this being a Supplemental Affidavit of Defense filed pursuant to leave of the Court entered March 20, 1936, overruling deponent's statutory demurrer:

The averments of fact in the First to Eleventh Paragraphs of Plaintiff's Amended Statement of Claim are admitted, with the qualification that check dated April 30, 1932 for Four thousand five hundred and thirteen dollars and thirty-seven cents ($4,513.37) was mailed to taxpayer as a result of Schedule IT–46030, dated March 15, 1932, making said refund, and not as a result of Certificate of Overassessment as alleged by plaintiff in Paragraph 10.

NEW MATTER

Filed April 2, 1936

1. Defendant alleges that suit was brought in the above entitled case on April 26, 1934, and that the refund, the amount of which plaintiff seeks to recover, was made on March 15, 1932, which was the time of signing by the Commissioner of Internal Revenue of the Schedule of Overassessment in this case, to wit, Schedule IT–46030, dated March 15, 1932, as of which Schedule the Certificate of Overassessment was issued to the defendant, as set forth in Paragraph 9 of Plaintiff's Amended Statement of Claim, and that the amount of said refund is not recoverable by suit in that said suit was not begun before the expiration of two (2) years after the mak-

ing of said refund, as required by Section 610 of the Revenue Act of 1928, as amended by the Revenue Act of 1932.

(Robert K. Wurts).
ROBERT K. WURTS.

21 Sworn to and subscribed before me this 1st day of April, A. D. 1936.

[SEAL] A. A. JONES, *Notary Public.*

My Commission Expires Jan. 18, 1939.

In United States District Court

Motion for judgment for want of sufficient affidavit of defense and rule to show cause thereon

Filed April 24, 1936

Now comes Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, and moves for judgment, assigning therefor the following reasons:

1. The Supplemental Affidavit of Defense and New Matter raised therein does not raise any evidence sufficient in law or fact to prevent judgment on the pleadings.

(s) CHARLES D. McAVOY,
United States Attorney.

22 *Rule to show cause*

Before DICKINSON, J.

And Now, to wit: this 24 day of April, A. D. 1936, upon motion of Charles D. McAvoy, the Court grants rule to show cause against the defendant why judgment should not be entered for want of a sufficient affidavit of defense.

Said rule returnable 25th day of May, A. D. 1936, Room 303, Post Office Building, 9th and Chestnut Streets, Philadelphia.

By the Court.

Attest:

LEO A. LILLY, *Deputy Clerk.*

In United States District Court

Opinion sur rule for judgment

Filed Aug. 28, 1936

DICKINSON, J., August 28th, 1936.

An Act of Congress gives the United States the right to recover from a taxpayer moneys re-paid to the taxpayer out of taxes paid by him upon the tax payment being found to have been erroneously made and the finding being afterwards found to have itself been erroneous. The right to recover for any such re-payment is how-

ever conditioned upon suit therefor being brought within two
23 years of the refunding or return of the taxes supposedly
erroneously paid. The question in this case is whether the suit was instituted within the two years. In the process for the return of an over payment of taxes there are several steps. The first is a determination that the taxpayer has made an over payment. The final step is the delivery to him of a check or other voucher for the sum over paid. The substantial question is whether the two years within which the suit must be brought begins to run at the date of the erroneous finding that the taxpayer was entitled to a return of his money or begins to run when the check for the return payment reaches the taxpayer. If the first suggested date is the correct one, this action was not brought in time; if the second date suggested is the correct one, it was brought in time. In discussing the question we will ignore the intermediate steps, such as authorizing the issuance of the check and the making of it out.

The question was first raised on a statutory demurrer. We ruled it in favor of the plaintiff on the authority of the case of Paulson vs. U. S., 78 Fed. Rep. (2d), 97, and overruled the demurrer, with leave to the defendant to file an affidavit of defense. This affidavit was filed raising the same question as before, and is met by a rule for judgment.

DISCUSSION

What we have is in effect a re-argument of the question before ruled. We repeat the comment before made that the question is one which it is more important to have settled than to have settled in
accordance with legal logic. Congress undoubtedly could have
24 conditioned the right to bring this action upon any terms it
saw fit. It imposed a two years' limitation condition. In every case a date must be found at which the two years begins to run. At least the earlier Acts left this date more or less uncertain. We say this because of the litigation provoked. The Paulson case, as we view it, determined the last of the two dates mentioned to be the date intended by the Act of Congress. Independently of the question of the correctness of the conclusions reached, our view was that this ruling should be accepted as a finality. The very question raised here was presented for the consideration of Congress, and was disposed of in an amendment of Section 610 of the Revenue Act of 1928 by the Revenue Act of 1932. We are of course bound by the latest legislation on the subject. If the rule announced in the Paulson case has been since changed by legislation, we must follow the latter. The Paulson case was ruled after the amendment had been passed but no reference was made to it in the opinion disposing of that case. The omission to refer to it would, however, be of no importance if it was in force. It is now urged, however, that the amended Act had no bearing upon the Paulson case because the case arose before the amendment and by its terms did not have applica-

tion. A re-examination of the case discloses that this is true and hence the instant case is to be ruled not in accordance with the Paulson ruling but in accordance with Section 1104 of the Act of 1932. This defines the date for which the two years begins to run as the date when the Commissioner first signed the "schedule of over payment in respect of" the Internal Revenue tax claimed to have been over paid. Under the facts of this case this date brands the
25 action as brought too late. As the Paulson case was determined under the provisions of the prior Acts, and the instant case is to be determined under the latter amendment, it follows that the Paulson ruling does not apply.

This conclusion confronts us with a procedural difficulty. We ruled on the statutory demurrer that the action had been brought in time. We are now asked to rule that it had not been brought in time. The ruling made, whether erroneous or not, became, when made, the law of the case, from which we would not at any subsequent stage be at liberty to depart. We must therefore get rid of the ruling before made before we can make the ruling now asked to be made. This can only be done in one of two ways. The ruling on the statutory demurrer may be revoked and the statutory demurrer withdrawn and the present motion for judgment refused, or we can treat the affidavit of defense as withdrawn, and the present motion as one for a re-argument of the statutory demurrer. If the first mode of procedure is followed, the case must go to trial. If the second mode is followed, we can now dispose of the case as upon a re-argument of the statutory demurrer, vacate the order made, and now enter an order in accordance with the Practice Act of 1915, sustaining the statutory demurrer. We think it is the province of counsel for the defendant to determine the procedure to be followed.

We therefore dispose of the case by granting leave to submit an order in accordance with this opinion.

26 In United States District Court

Motion for leave to withdraw supplemental affidavit of defense

Filed Oct. 9, 1936

And now, October 9th, 1936, comes Robert K. Wurts, the defendant above-named, by his attorneys, Sanford D. Beecher and Archibald T. Johnson, Esquires, and moves the Court as follows:

(a) To grant leave to the defendant to withdraw the Supplemental Affidavit of Defense filed in the above and to order the same to be marked "Withdrawn."

SANFORD D. BEECHER,
ARCHIBALD T. JOHNSON,
Attorneys for Defendant.

In United States District Court

Judgment

Filed October 9, 1936

And now, to wit, this 9th day of October 1936, it is ordered (a) Defendant's motion to withdraw the Supplemental Affidavit of Defense filed herein is granted and the clerk is directed to mark the same "withdrawn".

(b) Reargument upon affidavit of defense by way of statutory demurrer having been had, the order heretofore made overruling the statutory demurrer is vacated.

(c) The said statutory demurrer is sustained, and final judgment entered for defendant herein in accordance with opinion filed on August 28, 1936.

By the Court,

DICKINSON, *J.*

In United States District Court

Exception to judgment

Filed Jan. 4, 1937

And now, to wit, this 4th day of January, A. D. 1937, the plaintiff, The United States of America, by its attorney, Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, excepts to the action of the Court in entering judgment for the defendant.

CHARLES D. McAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Order allowing exception

Filed Jan. 4, 1937

And now, to wit, this 4 day of January, A. D. 1937, the above exception is allowed.

O. B. DICKINSON, *J.*

In United States District Court

Assignment of errors

Filed Jan. 11, 1937

And now, to wit, this fourth day of January, A. D. 1937, comes the United States of America by its attorney, Charles D. McAvoy,

United States Attorney in and for the Eastern District of Pennsylvania, and makes and files this assignment of errors:

1. The learned trial judge erred in holding that the plaintiff's action was not commenced within the time allowed by law.

2. The learned trial judge erred in holding that under the action brought under Section 610 of the Revenue Act of 1928 for the recovery of monies erroneously refunded to the defendant the limitation period for bringing of such action was two years from the issuance of the certificate of overassessment.

29 3. The learned trial judge erred by sustaining defendant's statutory demurrer to plaintiff's petition.

4. The learned trial judge erred in allowing the entry of judgment in favor of the defendant and against the plaintiff.

CHARLES D. MCAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Petition for appeal

Filed Jan. 4, 1937

And now, to wit: this 4th day of January, A. D. 1937, comes the United States of America, by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, feeling aggrieved by the judgment entered herein on October 9, 1936, in favor of the defendant and against the plaintiff, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, and prays that said appeal may be allowed and does hereby present its assignment of errors, and prays that said

30 case may be certified to the said Circuit Court of Appeals for the Third Circuit.

CHARLES D. MCAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Order allowing appeal

Filed Jan. 4, 1937

Before DICKINSON, J.

And now, to wit: this 4 day of January, A. D., 1937, it is ordered that the appeal be allowed as prayed for.

By the Court,

DICKINSON, *J.*

31 In United States District Court

Praecipe for record

Filed Jan. 11, 1937

To the Clerk, United States District Court for the Eastern District of Pennsylvania:

Sir: Prepare transcript of the record in the above entitled case for filing in appeal to the Circuit Court of Appeals and include the following:

Docket Entries.

Statement of Claim.

Petition for rule to show cause why more specific Statement of Claim should not be filed, and Order of Court granting same.

Amended Statement of Claim.

Affidavit of Defense raising questions of law.

Opinion, Dickinson, J., granting leave to file supplemental affidavit of defense.

Supplemental Affidavit of Defense and New Matter.

Motion for judgment for want of sufficient Affidavit of Defense and Order of Court granting rule to show cause, etc.

Opinion, Dickinson, J., finding for defendant.

Motion by defendant for leave to withdraw Supplemental Affidavit of Defense.

Order of Court directing that Supplemental Affidavit of Defense be marked withdrawn, vacating order over-ruling statutory demurrer and sustaining demurrer, and entering judgment for defendant.

32

Exception, and Order allowing same.

Assignment of Errors.

Petition for Appeal.

Order allowing petition for appeal.

Praecipe for Record sur Appeal.

Clerk's certificate, and no others.

Charles D. McAvoy,
United States Attorney.
Thomas J. Curtin,
Assistant United States Attorney.

[Clerk's certificate to foregoing transcript omitted in printing.]

34 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 2d day of April 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph

Buffington, Honorable J. Whitaker Thompson, and Honorable John Biggs, Jr., Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 13th day of July 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

35 In United States Circuit Court of Appeals for the Third Circuit

No. 6326. March Term, 1937

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROBERT K. WURTS, DEFENDANT-APPELLEE

Upon Appeal From the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, THOMPSON, and BIGGS, Circuit Judges.

Opinion

Filed July 13, 1937

THOMPSON, Circuit J.

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The United States brought suit, April 26, 1934, for the recovery of 1929 income taxes alleged to have been erroneously refunded to the taxpayer, appellee herein. The certificate of over-assessment was issued to the appellee on March 15, 1932, but the check was not mailed until April 30, 1932. The District Court entered judgment for the appellee upon an
36 affidavit of defense in lieu of a statutory demurrer, ruling that more than two years had expired after the making of the refund.

The following statutory provisions are involved:

Revenue Act of 1928, 26 U. S. C. A. 1646.

"(b) Any portion of an internal revenue tax . . . which has been erroneously refunded . . . may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund."

Revenue Act of 1932, 26 U. S. C. A. 1670.

"(3) Where the Commissioner has (before or after June 6, 1932) signed a schedule of overassessments in respect of any internal revenue tax imposed by the Revenue Act of 1932, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

The Revenue Act of 1928 (26 U. S. C. A. 1646) provides that suit for recovery of a refund may be brought only if begun before the

expiration of two years after the making of the refund. The dispute arises because of conflicting interpretations of the meaning of the word "making." The appellant contends that a refund is "made" only upon payment of the check, the appellee contends that a refund is "made" immediately upon the signing of the schedule of overassessment. Light is thrown upon the Congressional intent when we examine the quoted section of the Revenue Act of 1932 (26 U. S. C. A. 1670) which determines the date of allowance of refund as the date on which the Commissioner signed the schedule of overassessment. Committee Reports of both Senate and House
37 lend additional weight to the theory that the refund is made when the schedule of overassessment is signed. The United States is given statutory leave to recover refunds, but only upon the condition that the action be brought within two years from the date of the signing of the schedule of overassessment. The case of Paulson v. United States, 78 F. (2d) 97, involved refunds which did not come within the period prescribed in the Revenue Act of 1932 and is therefore inapplicable. We are of the opinion that the District Court correctly entered judgment on the pleadings.

The judgment of the Court below is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

38 In United States Circuit Court of Appeals for the Third Circuit

No. 6326. March Term, 1937

UNITED STATES OF AMERICA, PLAINTIFF APPELLANT,

vs.

ROBERT K. WURTE, DEFENDANT APPELLEE

Judgment

Filed July 13, 1937

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby Affirmed.

Philadelphia, July 13, 1937.

J. W. THOMPSON,
Circuit Judge.

[File endorsement omitted.]

39 [Clerk's certificate to foregoing transcript omitted in printing.]

40 Supreme Court of the United States

Order allowing certiorari

Filed November 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 41,980. U. S. Circuit Court of Appeals, Third Circuit. Term No. 499. The United States of America, Petitioner vs. Robert K. Wurts. Petition for a writ of certiorari and exhibit thereto. Filed October 13, 1937. Term No. 499 O. T. 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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20994—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above cause on July 13, 1937.

OPINIONS BELOW

The opinion of the District Court (R. 22–25) is not reported. The opinion of the Circuit Court of Appeals (R. 35–36) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 37). The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under a statutory provision requiring the United States to bring suit for the recovery of an erroneous refund within "two years after the making of such refund", the limitation period commences to run from the date on which the Commissioner of Internal Revenue approves the schedule of refunds and credits, or from the date of the delivery of the refund check.

STATUTES AND COMMITTEE REPORTS INVOLVED

The statutes and committee reports involved will be found in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts, as alleged in petitioner's statement of claim (R. 12–14), and admitted by respondent (R. 15–16), are as follows:

On or about March 15, 1930, the taxpayer filed an income tax return for the year 1929 reporting a net income of $94,065.14, and a tax of $17,195.14, which was duly paid (R. 13).

As the result of an audit of the taxpayer's return, the Commissioner of Internal Revenue erroneously determined that the taxpayer's reported net income was overstated in the amount of $21,835.87, representing the amount received by

him as beneficiary of a trust created under the will of his wife (R. 13).

Thereafter an overassessment certificate, dated March 15, 1932, issued; and as a result of said overassessment, a certificate check dated April 30, 1932, in the amount of $4,513.37, was mailed to taxpayer (R. 13, 14).

After demand, the taxpayer refused to repay the amount, and on April 26, 1934, this action was commenced (R. 1, 14).

On November 23, 1934, the taxpayer filed an affidavit of defense (R. 15–16), raising the question of law that the amended statement of claim showed on its face that suit was not brought before the expiration of two years after the making of the refund.

The District Court first ruled in favor of the Government (R. 17–19), but on reconsideration held for the taxpayer (R. 22–25). Final judgment accordingly was entered for the taxpayer (R. 26–27). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Government's action was not commenced within the time allowed by law.

2. In holding that in an action brought under Section 610 of the Revenue Act of 1928 for the recovery of moneys erroneously refunded to the

taxpayer the limitation period commenced upon the signing of the certificate of overassessment.

3. In affirming the District Court's judgment sustaining the taxpayer's demurrer to the petition and in dismissing the case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that the "making" of a refund, which starts the two-year limitation period governing recovery of erroneous refund, Section 610 (b) of the Revenue Act of 1928, *infra*, p. 11, occurs when the Commissioner first signs the schedule of overassessment, in view of Section 1104 of the Revenue Act of 1932, *infra*, p. 12, which provides that the date on which the Commissioner first signed a schedule of overassessment, if after May 28, 1928, "shall be considered as the date of allowance of refund or credit."

1. The decision is based upon a misconstruction of Section 610 of the Revenue Act of 1928, and upon a misapplication of Section 1104 of the Revenue Act of 1932. The Government contends that the limitation period prescribed by Section 610 started running only upon the delivery of the refund check, and that Section 1104 deals with an intra-departmental process fundamentally different from the making of a refund, was enacted for a different purpose, is not in *pari materia* with Section 610, and in no way modifies that section.

It is clear that in the Revenue Act of 1928, Congress appreciated the fundamental distinction be-

tween the allowance of a claim for refund and the making of a refund. Substantially the same definition of "date of allowance of refund" as that stated in Section 1104, was contained in Section 1116 (b) (2) of the Revenue Act of 1926, *infra*, pp. 11–12, which used it to fix the date terminating interest to the taxpayer on a refund. In Section 614 of the Revenue Act of 1928, *infra*, p. 12, in close sequence with Section 610, Congress changed Section 1116 of the 1926 Act by providing that interest should run to a date preceding the date of the refund check by not more than thirty days. The Report of the House Committee on Ways and Means explained the change as follows (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35):[1]

> The principal change made in existing law is that in the case of a refund the interest period now terminates with *the allowance of the refund, a date which often precedes the actual making of the refund by a considerable period of time* and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30

[1] The Senate Finance Committee made the same Report (S. Rep. No. 960, 70th Cong., 1st Sess., p. 43).

> days of the *date of the refund.* [Italics supplied.]

This report clearly evinces the understanding of Congress that the "making" of the refund takes place when payment is actually made, subsequent to the signing of the schedule.

Section 1104 of the 1932 Act is not in *pari materia* with Section 610. Congress defined the date of allowance of a refund or credit, and made the definition retroactive to the date of the passage of the 1928 Act which contained no similar definition,[2] primarily for the purpose of determining whether a credit or refund was timely or not. *Cf. United States* v. *Swift & Co.*, 282 U. S. 468. The Committee Reports, *infra*, pp. 12–14, reveal that Congress set the date of allowance at the date on which the Commissioner first signed the schedule in order to permit small taxpayers, unaware of their right to a refund, to take advantage of the fact that before the expiration of the statutory period governing claims for refund, the Commissioner had signed a schedule. The considerations which prompted Congress to save the rights of a taxpayer, entitled to a refund, from prejudice because of the complicated intra-departmental process by which a schedule is transmuted into the correct bookkeeping entry—statement, credit, or refund—do not sug-

[2] Section 614 of the 1928 Act modified Section 1116 of the 1926 Act, and failed to reenact any definition of date of allowance.

gest that while this process is going on, and while the Commissioner might still "scratch out his signature, and declare it [the schedule] inadvertent", *Daube* v. *United States*, 289 U. S. 367, 372, the statute of limitations was intended to run against the United States on a suit which the Government cannot yet institute against a taxpayer not rightfully entitled to the refund.

2. The decision is in substantial conflict with *Paulson* v. *United States*, 78 F. (2d) 97 (C. C. A. 10th). Two suits were there involved. Both were filed more than two years after the schedule of overassessments was approved; one was filed within two years of the issuance of the refund check; the other was filed more than two years after the mailing of the refund check but less than two years after the delivery thereof. The Circuit Court of Appeals held both suits timely (p. 99).

> * * * the refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered. Communication with the taxpayer absent, the preceding actions are exclusively intradepartmental or interdepartmental, and may

> be changed, corrected, revised, or rescinded, as circumstances require. The Commissioner may declare the schedule erroneous or inadvertent and erase his signature from it without violating any rights of the taxpayer. *Daube* v. *United States*, 289 U. S. 367, 53 S. Ct. 597, 77 L. Ed. 1261. Ordinarily a statute of limitation does not begin to run until a suit could be brought. Certainly it cannot be contended that a suit of this nature may be maintained and judgment secured after the schedule of refunds and credits has been approved, but before the money is paid to the taxpayer.

It is true that in the *Paulson* case the schedules of overassessment were signed before May 28, 1928, and hence were not affected by Section 1104 of the Revenue Act of 1932, *infra*, p. 12. But it is manifest that Section 1104 would not have evoked a different decision. The court did not even comment on the definition of date of "allowance" of a refund contained in Section 1116 (b) (2) of the 1926 Act. Indeed, the court explicitly rejected the contention that the date of allowance is the date on which a refund is made within the meaning of Section 610 of the Revenue Act of 1928 (p. 99):

> * * * the statute does not provide that the suit shall be filed within two years after the refund is allowed. On the contrary, it is provided textually that the period shall run from the time the refund is made. The distinction between the act of allowing a

> refund and that of refunding the money is manifest, * * *. Congress could have provided that suit must be filed within two years after the refund is allowed; but for reasons sufficient unto itself, it provided otherwise.

That the Circuit Court of Appeals for the Tenth Circuit has persisted in this view even as to schedules signed after May 28, 1928, is indicated by *Smyth* v. *United States*, Prentice-Hall, 1937 Federal Tax Service, par. 1491 (July 1, 1937). Although it appears from the record that that suit was filed within two years of the approval of the schedule of refunds, that fact is not disclosed by the opinion, and in the opinion, which treats of the effect of Section 610 of the Revenue Act of 1928, the court states simply that the amount of the overassessment was refunded on January 11, 1932, and that complaint was filed November 9, 1933. It is clearly the date of the actual payment by the Government which the court regards as significant.

3. The question in this case is important for the practical administration of the income tax laws. Though there has been no published administrative ruling, the officials of the Bureau of Internal Revenue and of the Department of Justice have consistently proceeded upon the assumption that the statute of limitations starts running with the delivery of the refund check. An investigation of all suits brought by the United States to recover an erroneous refund and now pending in the dis-

trict courts, discloses that in twenty-two cases,[3] though the taxpayer has not yet raised the point, the facts are that suit was filed more than two years after the Commissioner signed the schedule but within two years of the actual payment of the refund. In three other cases, including one now before the Circuit Court of Appeals for the Ninth Circuit, the taxpayer, after the instant case was decided by the Circuit Court of Appeals for the Third Circuit, raised the issue of the expiration of the limitation period. These cases involve a total amount of several millions of dollars.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

OCTOBER 1937.

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[3] These cases arise in seven circuits, as follows:
First Circuit: (D. Mass.) (2 cases); (D. R. I.).
Second Circuit: (D. Conn.) (3 cases); (E. D. N. Y.); (S. D. N. Y.); (D. Vt.).
Third Circuit: (D. N. J.); (E. D. Pa.) (4 cases).
Fifth Circuit: (S. D. Fla.); (D. Ga.).
Seventh Circuit: (N. D. Ill.) (2 cases); (D. Ind.).
Ninth Circuit: (S. D. Cal.) (2 cases).
Tenth Circuit: (W. D. Okla.).
The same facts characterize another case, now before the Circuit Court of Appeals for the Eighth Circuit on another question.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund * * *.

(b) As used in this section—

* * * * *

(2) The term "date of the allowance of the refund means, in the case of any income, war-profits, or excess-profits tax, the first

date on which the Commissioner signs the schedule of overassessments in respect thereof.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 614. INTEREST ON OVERPAYMENTS.

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * *

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

* * * * *

(U. S. C., Title 26, Sec. 1671.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

Extract from Report of Senate Finance Committee having reference to Section 1116 of the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38):

In the case of refunds, interest is allowed "to the date of the allowance of the refund." In practice the commissioner first signs a

schedule of overassessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of overassessments.

Extract from Report of Senate Finance Committee having reference to Section 1104 of the Revenue Act of 1932 (S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 57-58):

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allow-

ance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 Act.

Extract from Report of House Committee on Conference (H. Rep. No. 1492, 72d Cong., 1st Sess., pp. 28–29):

Amendment No. 259: This amendment makes it clear that credits or refunds are to be considered as allowed on the date on which the commissioner first signed the schedule of overassessments, provided the schedule was signed after May 29, 1928; and the House recedes.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 9–11) is not reported. The opinion of the Circuit Court of Appeals (R. 15–16) is reported in 91 F. (2d) 547.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 16). The petition for a writ of certiorari was filed on October 13, 1937, and was granted on November 15, 1937 (R. 17).

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under a statutory provision requiring the United States to bring suit for the recovery of an erroneous refund within "two years after the making of such refund," the limitation period commences to run from the date on which the Commissioner of Internal Revenue approves the schedule of overassessments, or from the date of payment to the taxpayer.

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> * * * * *
>
> (b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Other pertinent statutes are set out in Appendix A, *infra*, pp. 39–44.

STATEMENT

The facts, as alleged in the Government's amended statement of claim (R. 4–6), and admitted by the taxpayer (R. 6), are as follows:

On or about March 15, 1930, the taxpayer filed an income tax return for the year 1929, reporting a net income of $94,065.14, and a tax of $17,195.14, which was duly paid (R. 5).

As the result of an audit of the taxpayer's return, the Commissioner of Internal Revenue erroneously determined that the taxpayer's reported net income was overstated in the amount of $21,835.87, representing the amount received by him as beneficiary of a trust created under the will of his wife [1] (R. 5).

Thereafter, an overassessment certificate, dated March 15, 1932, issued; and as a result of said overassessment, a certificate check dated April 30, 1932, in the amount of $4,513.37, was mailed to taxpayer (R. 5).

After demand, the taxpayer refused to repay the amount, and on April 26, 1934, this action was commenced (R. 1, 6).

On November 23, 1934, the taxpayer filed an affidavit of defense (R. 6), raising the question

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[1] The adjustment was based upon the decision of *Warner* v. *Walsh*, 15 F. (2d) 367 (C. C. A. 2d), which held that a surviving spouse who had decided to accept the net income of a testamentary trust in lieu of dower and/or statutory rights, had purchased an annuity and was not taxable until the capital had been recouped. After the refund was made in the case at bar upon the basis of that decision, this Court held otherwise in *Helvering* v. *Butterworth*, 290 U. S. 365, by deciding that a widow who had accepted the benefits of a will in lieu of her statutory rights had not purchased an annuity and that the currently distributable income of the testamentary trust was taxable to her as the beneficiary.

of law that the amended statement of claim showed on its face that suit was not brought before the expiration of two years after the making of the refund.

The District Court first ruled in favor of the Government (R. 6–8), but on reconsideration held for the taxpayer (R. 9–11). Final judgment accordingly was entered for the taxpayer (R. 12). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 15–16).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Government's action was not commenced within the time allowed by law.

2. In holding that in an action brought under Section 610 of the Revenue Act of 1928 for the recovery of moneys erroneously refunded to the taxpayer the limitation period commenced upon the signing of the certificate of overassessment.

3. In affirming the District Court's judgment sustaining the taxpayer's demurrer to the petition and in dismissing the case.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals erred in holding that the "making" of a refund, which starts the two-year limitation period governing recovery of erroneous refunds (Section 610 (b) of the Revenue Act of 1928), occurs when the Commissioner first signs the schedule of overassessments, because

that is the "date of allowance of refund or credit" under Section 1109 of the Revenue Act of 1932. It has confused two entirely distinct statutory concepts: the provisions of Section 610 relating to the "making" of a refund were enacted for the first time in 1928; the "date of allowance" is a phrase which antedates the 1928 Act by many years. The "making" of a refund contemplates a completed transaction, whereas the "allowance" of a refund refers to a specific intradepartmental step that is revocable in nature. We submit that the "making" of the refund means payment, and that therefore the limitation period started running only upon payment.

Plainly, the Government's right of action cannot accrue until the refund has been paid to the taxpayer. And this Court and Congress have both recognized that a statute of limitations should not start running prior to the accrual of the cause of action. Moreover, the mere "allowance" may not result in a refund at all; the overassessment may be used up as an abatement or credit; or errors may be detected even subsequent to the drawing of the refund check which would prevent its delivery to the taxpayer. See *Daube* v. *United States*, 289 U. S. 367, 372.

The construction of the court below, by starting the running of the statute prior to the accrual of the cause of action, in effect penalizes the Government because of its careful and elaborate procedure

designed to insure the correct disbursement of public funds, and may even start the statute running before the error has occurred. The taxpayer is not entitled to "repose" prior to the date when he receives the refund check and the certificate of overassessment.

The court erred in using a section defining "allowance" of a refund to construe a section involving the "making" of a refund. The popular meaning of the words "making of such refund," taken together with their location in Section 610, discloses that they contemplate a completed payment. This is the meaning used in Section 710 of the Revenue Act of 1928, *infra*, p. 20, which provides that refunds in excess of $75,000 shall be reported to a joint committee of Congress before they are "made," and in the Committee Report proposing Section 614, in close sequence with Section 610. A different content for the word "made" is indicated in Section 322 (b) because of a strong policy against penalizing taxpayers, and holding refunds to them not timely, where the Commissioner has timely approved the overassessment and the delay in payment is due to administrative procedure and delays in Congressional appropriation over which the taxpayers have no control. The amendments to Section 610 confirm the conclusion that "making," as there used, means payment.

Section 1104 of the 1932 Act does not aid in the proper construction of Section 610 of the 1928 Act. It was designed to clarify the confusion as to the

meaning of "date of allowance" which attended a change in the Bureau practice preliminary to the consummation of a refund, and it was intended to affect only those problems which are resolved in terms of the date of "allowance." It is not *in pari materia* with Section 610, and should not be taken impliedly to modify that section of the earlier Act.

The Circuit Court of Appeals for the Tenth Circuit, the only other court which has passed on the question in this case, has accepted the view urged by the Government. *Paulson* v. *United States*, 78 F. (2d) 97.

The correct interpretation of Section 610 seems clear, but even if there were any doubts, they should be resolved in favor of the Government, since this is a statute of limitations barring a right of the Government. The action is not based upon a right granted by Section 610, but is an action for money had and received, i. e., for money which has been erroneously paid out of the public treasury. The canon that taxing statutes are to be construed liberally in favor of the taxpayer is inapplicable, since this suit was brought against respondent not as a taxpayer, but merely as one not entitled *ex aequo et bono* to retain Government funds erroneously paid out to him.

ARGUMENT

THE REFUND WAS MADE WHEN THE PAYMENT WAS EFFECTED AND NOT WHEN THE CLAIM WAS ALLOWED

The Circuit Court of Appeals held that the "making" of a refund, which starts the two-year

limitation period governing recovery of erroneous refunds (Section 610 (b) of the Revenue Act of 1928, *supra*, p. 2), occurs when the Commissioner first signs the schedule of overassessments. To reach that result it relied upon Section 1104 of the Revenue Act of 1932, *infra*, p. 43, which provides that the date on which the Commissioner first signed a schedule of overassessments, if after May 28, 1928, "shall be considered as the date of *allowance* of refund or credit." [Italics supplied.]

We submit that the decision is based upon a misconstruction of Section 610 of the Revenue Act of 1928, and upon a misapplication of Section 1104 of the Revenue Act of 1932. We contend that the limitation period prescribed by Section 610 started running only when the payment of the refund to the taxpayer was made.

A

A brief description of the practice of the Bureau of Internal Revenue in the consummation of a refund will supply background for the interpretation of these administrative sections.

In the first instance the Bureau prepares a certificate of overassessment for each taxpayer whose return discloses an overassessment. When the Commissioner accumulates a number of such certificates with respect to taxpayers in a single collection district, there is prepared a schedule of overassessments, one line on the schedule dealing with each taxpayer's account for the taxable year

in question. Along with the individual certificates of overassessment, this schedule is sent to the Collector, with directions to determine whether the overassessment is to be effected by means of an abatement of unpaid taxes for the year involved, or, if there is an overpayment, by means of a credit against taxes due and unpaid, or, in the absence of other taxes due, by means of a refund.

Formerly (before 1927), the Collector would not only check and make appropriate entries on the schedule of overassessments transmitted to him, but he would also execute a subsidiary schedule of refunds and credits, on which he would indicate whether he had entered a credit, and any amounts refundable. The Collector would return the two schedules and the certificates of overassessment; the schedule of refunds and credits would be checked by the Deputy Commissioner, then signed by the Commissioner and sent by him to the disbursing clerk of the Treasury to draw checks for the refunds shown on the schedule, the schedule containing a printed direction to that effect. See *Girard Trust Co.* v. *United States*, 270 U. S. 163, 164–166; *United States* v. *Swift & Co.*, 282 U. S. 468, 471–473.

Since January 1927, with the adoption of a new form for the schedule of overassessments,[2] the second schedule, namely, the schedule of refunds and credits, has been abandoned. See S. Rep. No. 665,

[2]Appendix C, *infra*, p. 49.

72d Cong., 1st Sess., p. 57, *infra*, p. 46. The Commissioner, who is the official "authorized * * * to remit, refund, and pay back all taxes erroneously or illegally assessed or collected,"[1] gives formal approval only to the schedule of overassessments. The Commissioner's "final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule." *Ibid.* The Collector returns the certificates of overassessments with the schedule of overassessments on which are indicated the appropriate amounts of abatement, credit, and refund.

The Deputy Commissioner (who holds a distinct statutory office, Act of October 6, 1917, c. 79, 40 Stat. 348, Sec. 1; Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 1301 (a) (U. S. C., Title 26, Secs. 1715, 1716)) rechecks the amount of the refund, and computes interest on the overpayment (which runs to within thirty days of the date of the refund check, Section 614 (a) (2) of the 1928 Act). The schedule is then forwarded to the General Accounting Office for a pre-audit. If no reason for disallowing the refund, or off-setting it against another debt due the Government, is there discovered, the schedule is returned to the Bureau, where it is charged against the Congressional appropriation for the refund of taxes erroneously collected, and

[1] Revised Statutes, Section 3220.

then forwarded to the disbursing clerk of the Treasury Department who, following the Commissioner's directions contained in the schedule, draws a check for the amount of refund shown.[4] The checks, together with the certificates of overassessment, are then sent to the Collector for joint release to the taxpayer.

B

The limitation period of Section 610 of the 1928 Act does not start running until the refund has been paid to the taxpayer; until then the Government has no right of action.

Under the administrative practice as outlined, the refund is said to be "allowed" on the date when, in the ordinary course of events, the final decision and approval has been given by the Commissioner, the official authorized by statute to refund overpayments, see *supra*, p. 10. Under the former practice, the date of allowance was the one on which the Commissioner approved and signed the schedule of refunds and credits, see *United States* v. *Swift & Co.*, 282 U. S. 460, 474, 476. Under the new practice it is the date on which he signs the schedule of overassessments, according to the rule laid down in Section 1104 of the 1932

[4] This information has been obtained from officials of the Bureau of Internal Revenue. Much of it is indicated on the schedule of overassessments itself, see Appendix C, *infra*, p. 49. A further description of the practice is set out in Paul and Mertens, Law of Federal Income Taxation, § 42.25, reprinted *infra*, Appendix D, p. 51. See also *Eastman Kodak Co.* v. *United States*, 13 F. Supp. 435, 444 (C. Cls.).

Act, which was designed to enact the new practice into statute. See S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57–58, *infra*, pp. 46–47.

But under both the old and the new practice, it is clear that the *allowance* is merely an administrative step or decision, and is not equivalent to the payment of the refund. See *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169–170:

> Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual payment. The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.

Compare *Avery* v. *Commissioner*, 292 U. S. 210, where it was held that a dividend constitutes taxable income to a stockholder in the year it is first made available to him and not at the time it was declared by the board of directors.[1]

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[1] It may be noted that the certificate of overassessment (Form 7776) which is delivered to the taxpayer along with the refund check contains the following:

"NOTE.—The interest, if any, included herein is taxable income, and must be included in your income tax return *for the year in which received.*" [Italics supplied.]

It is apparent that the "allowance" by the Commissioner may not result in a refund. In the first place, as of the date when the schedule of overassessments is signed by the Commissioner, it may be that the entire overassessment will be used up as an abatement; or it may be applied as a credit; or it may result in a refund. And even when the Collector fills in the amount of the refund, the Deputy Commissioner still has an opportunity to detect mistakes. Moreover, the transmission of a check by the Treasury to the Collector does not preclude the Commissioner from correcting any errors which may develop. In *Daube* v. *United States*, 289 U. S. 367, a schedule of refunds and credits had been signed by the Commissioner (under the old practice), and the refund check sent to the Collector for delivery to the taxpayer. The Collector, upon discovery of a mistake, returned the check, whereupon the Commissioner cancelled the allowance of the refund.

This Court said (p. 372):

> The transaction never went beyond the stage of intradepartmental conference and parley. The Commissioner had put his hand, it is true, to a schedule of refunds and credits, and had transmitted a check to one of his subordinates to be delivered to the claimant. By none of these acts had he so divested himself of control as to generate rights or interests in favor of the taxpayer if there was revocation or rescission in advance of notice or delivery. There had been

> messages back and forth between the officers and branches of an administrative bureau. There had been none to the outer world. The Commissioner, after signing the schedule, might scratch out his signature, and declare it inadvertent. Cf. *Ridgway* v. *United States, supra; Austin Co.* v. *Commissioner*, 35 F. (2d) 910. This in substance is what he did. After signing a check and mailing it to his agent, he might cancel the check while the agent still held it, and revoke the authority improvidently granted. The matter was still *in fieri*.

In view of the fact that an action brought under Section 610 of the 1928 Act is an action to recover money "which has been erroneously refunded" to the taxpayer,[6] it is clear that the Government has no right of action until the payment has been made. Until that moment, it always has the opportunity of correcting an error (*Daube* v. *United States, supra*), and perhaps of eliminating all possibility of a refund.

Respondent's construction, therefore, would start the limitation period running prior to the accrual of the Government's cause of action. It is highly improbable that Congress intended such a result. As this Court said in *Borer* v. *Chapman*, 119 U. S. 587, 602:

> It cannot be that the statute of limitations will be allowed to commence to run against a

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[6] Even prior to the enactment of Section 610, the Government could bring an action for money had and received. See *infra*, pp. 34–35.

> right until that right has accrued in a shape to be effectually enforced.

Compare *Clark* v. *Iowa City*, 20 Wall. 583, 589; *Amy* v. *Dubuque*, 98 U. S. 470, 474.

That this principle is also recognized by Congress is clear from the history of the provisions placing time limitations upon the filing of refund and credit claims. Under the earlier Acts the period began to run "from the date when the return was due." Section 252 of the 1918 Act, c. 18, 40 Stat. 1057; Section 252 of the 1921 Act, c. 136, 42 Stat. 227. In Section 281 of the Revenue Act of 1924, c. 234, 43 Stat. 253, it was provided that the period should start running from the time of payment of the tax, a provision which has been continued in the subsequent Acts.[1] In proposing the change, the Committee urged (H. Rep. No. 179, 68th Cong., 1st sess., p. 27):

> Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues.

It cannot be considered that Congress intended to start the limitation period running prior to the accrual of the Government's cause of action, and

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[1] In Section 322 of the 1934 and 1936 Acts, Congress extended in part the basic limitation of two years from the payment of the tax by providing an alternative to the taxpayer of three years from the date when the return was due. The basic two-year period, as before, runs only from the date of payment; the alternative three-year period from the filing of the return is merely an additional margin of grace.

indeed at a time when it is uncertain whether a cause of action will ever accrue and in what amount. Such a construction would be tantamount to the imposition of a penalty upon the Government because of its careful and elaborate procedure designed to insure that it does not erroneously disburse the public funds to a person not entitled thereto, or to a person presently indebted to the United States.

Furthermore, *respondent's construction might start the statute of limitations running even before the error has occurred.* It is only *after* the Commissioner has signed the schedule of overassessments, and "allowed" the credits and refunds, that the Collector determines how much is to be abated, credited, and refunded. The mistake making the refund erroneous may occur at this step. Moreover, the error may occur even after this date, when the interest is computed by the Bureau before the schedule is sent to the disbursing clerk of the Treasury.

There is no apparent policy which would be served by respondent's construction. It is true that the statute of limitations should be viewed as a "statute of repose." See *Beatty* v. *Burnes,* 8 Cranch 98, 108; *Shepherd* v. *Thompson,* 122 U. S. 231, 235. But the taxpayer cannot argue that he should be accorded "repose" with respect to an erroneous refund even before he receives the money. In this connection, it is significant that even the fact that a refund has been allowed is "unknown

to the taxpayer" (see *Daube* v. *United States*, 289 U. S. 367, 373), until he receives, at the same time, the refund check and the certificate of overassessment. See Appendix D, *infra*, p. 51. To paraphrase the language in *United States* v. *Swift & Co.*, 282 U. S. 468, at 473, the first official notification which the taxpayer receives as to how his account has been handled with respect to abatement, credit, refund and interest is the certificate of overassessment which accompanies the check for payment, if any.

The contruction of the Circuit Court of Appeals gives rise to the anomaly of a statute of limitations running before the cause of action has accrued, and indeed possibly before the error has occurred; it causes hardship to the Government and penalizes it because of its careful checking procedure, without serving any real policy for the protection of taxpayers. Only plain language, which certainly is not present here, could justify such a result.

C

A consideration of the very words "making" and "allowance" supports the conclusion that they have entirely different meanings, and refer to different steps in the process of returning money paid by the taxpayer. In turning to a section defining "allowance" of a refund in order to construe another section involving the "making" of a refund, the court below seemed to consider the terms synonymous. The opinion below has been criticized on that

ground. Paul and Mertens, Law of Federal Income Taxation (1937 Cumulative Supp.), § 51.92, note 31b.[8]

1. In the absence of a contrary indication, it must be presumed that Congress used the phrase "making of such refund," in the generally accepted sense or popular meaning. See *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3; *Helvering* v. *San Joaquin Co.*, 297 U. S. 496, 499; *Paulson* v. *United States*, 78 F. (2d) 97, 99 (C. C. A. 10th). If we look to the ordinary or popular usage of the words, as set forth in Webster's New International Dictionary (2d ed., unabridged), the decision of the court below is unsupportable.

A refund is there defined as "that which is refunded." The transitive verb "refund" is defined as follows: "2. To return (money) in restitution, repayment, * * *, etc.; as, to *refund* the price of a defective machine; to *refund* a hundred dollars excess on a tax. 3. To supply again with refunds; to reimburse." When the word is used in connection with "make," it is evident that Congress contemplated a completed result, for "make" means primarily to produce, form, bring about. This conclusion is reinforced by the surrounding language in Section 610 (b). Congress there

[8] There it is stated:

> * * * the *Wurts* case [seems] to consider "allowance" and "making" as synonymous. It would seem that the *Paulson* case [discussed *infra*, p. 29] is more nearly correct in holding that "making" means the actual payment date, something totally different from "allowance."

speaks of a portion of a tax "which has been erroneously refunded," and provides that suit must be begun within two years "after the making of *such* refund." Plainly, the statute deals with a consummated transaction.

Moreover, the same dictionary states that "*Make* followed by a noun with the indefinite article is often nearly equivalent to the intransitive verb corresponding to that noun; as '*make* a splash,' to splash, * * *." In other words, "to make a refund" means "to refund," in the intransitive sense. And the intransitive verb "refund" is explicitly defined: "To make repayment." Accordingly, whether this phrase was employed in the transitive or intransitive sense, Congress clearly contemplated a completed transaction.

2. With respect to other sections of the Revenue Act, Congress has clearly indicated its acceptance of the popular meaning of the words "made" and "making" (of a refund), as outlined above.

In Section 614 of the Revenue Act of 1928, *infra*, p. 41, in close sequence with Section 610, Congress provided that interest should run to a date preceding the date of the refund check by not more than thirty days. In so doing, it abandoned the former rule contained in Section 1116 of the 1926 Act that interest should run to the "date of the allowance." The Report of the House Committee explained the change as follows (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35):

> The principal change made in existing law is that in the case of a refund the inter-

> est period now terminates with the *allowance* of the refund, a date which often *precedes* the actual *making* of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the *date of the refund*. [Italics supplied.]

The popular meaning of the word "made" was also used in Section 710 of the Revenue Act of 1928, *infra*, pp. 41–42. This section provides:

> No refund or credit of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be *made* after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. * * * [Italics supplied.]

It is apparent that Congress was not attempting in Section 710, *supra*, to delay the date of the revocable) allowance by the Commissioner. Compare *Ohio Oil Co.* v. *United States* (N. D. Ohio), de-

cided June 18, 1936, not reported but found in 1936 C. C. H., Vol. 4, pp. 10115, 10123, 10124. Congress was concerned with delaying the date of the *payment* of the large refund until the Joint Committee had an opportunity to consider it. Indeed, the statute contemplates that the "decision of the Commissioner" shall be forwarded to the Committee, and thirty days allowed to elapse, before the refund "shall be made." We are informed that under the administrative practice with respect to Section 710, which has been approved by the Joint Committee, the report is made to the Joint Committee on the date on which the schedule of overassessments is signed by the Commissioner, so that during the thirty days' consideration by the Joint Committee the schedule goes through the usual administrative handling by the Collector.[9] Thus, as the word is used in Section 710, the refund is certainly not deemed to have been "made" when the schedule is signed.[10]

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[9] The administrative practice is indicated more completely in *Pacific Coast Biscuit Co.* v. *United States*, 19 F. Supp. 545, 552.

[10] The predecessor to Section 710 of the 1928 Act is contained in the Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254, which even more clearly indicated that Congress employed the word "made" as synonymous with payment. There the deficiency appropriation measure with respect to the Bureau of Internal Revenue provides:

"*Provided*, That no part of this appropriation shall be available for *paying* any claim *allowed* in excess of $75,000 until after the expiration of sixty days from the date upon which a report giving the name of the person to whom the *refund is to be made*, the amount of the refund, and a sum-

3. In his brief in opposition to the petition for certiorari, respondent relies upon the provision in Section 322 (b) of the 1928 Act and the subsequent Acts that "No such credit or refund shall be allowed or made after two years from the time the tax was paid." But even assuming that Section 322 (b) preserves the rights of those taxpayers whose claims have been allowed within the two-year period, the construction of that section does not affect the proper interpretation of Section 610. The words "made" and "making," though normally used by Congress with the meaning accorded them by the lay mind and by the administrative officials, may be used in a different sense in a particular section, in the light of the context and the end in view. "The same words may have different meanings in different parts of the same statute," *Lamar* v. *United States,* 240 U. S. 60, 65; *Am. Security Co.* v. *District of Columbia,* 224 U. S. 491, 494. See *Towne* v. *Eisner,* 245 U. S. 418, 425, where this Court said that "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

In considering the meaning of the phrase "No such credit or refund shall be allowed or made," as used in Section 322 (b) and its statutory prede-

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mary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation * * *." [Italics supplied.]

cessors,"[11] the words may have to be suited to the very strong policy against penalizing taxpayers because of fortuitous circumstances, arising after allowance of the refund by the Commissioner, over which they have no control.

It is not likely that Congress intended to deprive a taxpayer of a refund properly and timely allowed where, for example, it could not be paid out because of the delay of Congress in making appropriations therefor.[12] Furthermore, literal adher-

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[11] The phrase was originally inserted as a proviso to Section 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

[12] See, e. g., *Consolidated Paper Co.* v. *United States*, 59 F. (2d) 281, 286 (C. Cls.), certiorari denied, 288 U. S. 615: "Pursuant to the usual practice the schedule of refunds and credits which had been signed and approved by the Commissioner was, on November 13, 1926, forwarded to the General Accounting Office for check to ascertain whether or not the taxpayer was otherwise indebted to the United States. The funds under the appropriation for '1927 and prior years,' from which all refunds and interest were payable, had been temporarily exhausted November 4, 1926. The 'Schedule of refunds and credits' was therefore returned by the General Accounting Office to, and was retained by, the accounts and collection unit of the Bureau of Internal Revenue to be held until such time as funds should become available, *as on former occasions*. Funds from which the item of interest could be paid under the appropriation for '1928 and prior years' were in the hands of the disbursing clerk of the Treasury Department on March 3, 1927." [Italics supplied.]

See also *Pittsburgh Bridge & Iron Works* v. *United States*, 40 F. (2d) 692, 695 (W. D. Pa.):

"The Commissioner had performed every act for payment of interest due the plaintiff under the act of 1924, except the actual mailing of the check and certificate of overassessment. These acts would have been done prior to February 26, 1926, if there had been available funds in the treasury."

ence to the wording of Section 322 (b) would have prejudiced taxpayers whose claims ran into purely mechanical difficulties after the date on which the Commissioner listed them on the schedule of overassessments (which the Treasury regarded as the date of allowance until the decision in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 170).

Indeed, this policy was recognized in the Committee Report proposing Section 1104 of the 1932 Act, *infra*, pp. 46–47, which reveals that Congress set the date of allowance at the date on which the Commissioner first signed the schedule in order to permit small taxpayers, unaware of their right to a refund, to take advantage of the fact that before the expiration of the statutory period for filing claims for refund, the Commissioner had signed a schedule. But the considerations which prompted Congress to save the rights of a taxpayer, entitled to a refund, from prejudice because of the complicated intradepartmental process by which a schedule is transmuted into the correct bookkeeping entry—abatement, credit, or refund—are far from suggesting that while this process is going on, and while the Commissioner might still "scratch out his signature, and declare it [the schedule] inadvertent" (*Daube* v. *United States*, *supra*, p. 372), the statute of limitations was intended to run against the United States on a suit which the Government can not yet institute against a taxpayer not rightfully entitled to the refund.

The meaning accorded the words in Section 322 (b) may reflect the strong policy to save the taxpayer from prejudice. However, in other sections, the end in view is best served by the natural meaning of the words. Thus, in Section 710 of the 1928 Act, *supra*, p. 20, Congress used the word "made" in its usual sense in order to express its purpose that the actual disbursement of public funds be delayed until its joint committee has had opportunity to examine the proposed action. And the natural meaning of the word "making" in Section 610 subserves the policy considerations underlying a statute of limitations.

4. Respondent has predicated an argument on the language used in amending Section 610 of the 1928 Act. The section has been amended twice. Section 502 of the Revenue Act of 1934, *infra*, p. 43, extends the limitation period to five years "from the making of the refund" where any part of the refund has been induced by fraud. Section 803 of the Revenue Act of 1936, *infra*, p. 44, provides that erroneous refunds shall bear interest from the date of payment of the refund. There is nothing in the latter amendment or its legislative history to support the taxpayer's contention that Congress used the phrase "payment of the refund" in a different sense from the phrase "making of such refund." Rather it seems that the slight variation in the language clarifies the situation and shows that with respect to this section Congress was concerned with the date on which the refund was actually

made, and not at all with the date of "allowance," however important that date might be in other types of cases. It seems reasonable to suppose that Congress intended both the statute of limitations and the Government's right to interest to start running on the same date.

D

Section 1104 of the 1932 Act does not affect in any way the proper construction of Section 610 of the 1928 Act. It merely defines the "date of allowance," to aid in the resolution of problems depending upon that date.

The Senate Committee Report on Section 1104, *infra*, p. 46, reveals that it was designed to clarify the confused situation with respect to the meaning of "date of allowance," arising from a change in Bureau practice.

Under earlier Bureau practice the Commissioner signed two schedules—first a schedule of overassessments which was forwarded to the Collector, and second, a schedule of refunds and credits, after the receipt of a report from the Collector. In cases in which it was important to ascertain the "date of allowance," this Court held that under that practice the date of the second schedule was to be taken as the "date of allowance." As will be shown below, pp. 31–32, it became important to determine the "date of allowance" because the statute provided for interest up to that date (*Girard Trust Co.* v. *United States, supra*), because the statute in force

on that date governed the amount of interest payable (*United States* v. *Boston Buick Co.*, 282 U. S. 476, 478; *Pottstown Co.* v. *United States*, 282 U. S. 479), and because the date of allowance of a credit determined the date of payment of the tax liability against which the credit was taken for purposes of measuring the limitation period with respect to claims for refund of that tax (*United States* v. *Swift & Co.*, 282 U. S. 468).

Under the new practice adopted in 1927, the Commissioner signed only the schedule of overassessments. In 1931, this Court decided the *Swift & Co.*, *Boston Buick Co.* and *Pottstown Co.* cases, *supra*, with respect to the former practice. The applicability of these decisions to the newer practice was not clear. Accordingly, in drafting the Revenue Act of 1932, Section 1104 was inserted in order to remove the uncertainty as to the "date of allowance" under the later practice. It did not in any way fix the date of "making" the refund, but merely accommodated itself to the new Bureau practice by defining the "date of allowance" for whatever purposes that phrase was significant.

The phrase was no longer significant for purposes of measuring the period during which interest accrues to the taxpayer, in view of the new provisions of Section 614 of the 1928 Act. But the phrase was still important, e. g., with respect to the limitation period under Section 322 (b) (2), and the Committee Reports disclose that that application was one of the factors which motivated the selection of the early date. And the phrase might still

be important for other purposes. See *United States* v. *Swift & Co.*, 282 U. S. 468; *McEachern* v. *Rose*, No. 6, present Term, decided November 8, 1937, *infra*, pp. 32–33; Section 1106 of the 1932 Act, *infra*, p. 43.

The foregoing shows that Section 1104 was meant to apply to, and to clarify, only those situations and sections hinging on the "date of allowance." It was not meant to modify Section 610 of the 1928 Act, which refers to the time of "making" of the refund. It is not *in pari materia* with Section 610. Moreover, it may be noted that on the two occasions when Congress desired to amend Section 610, it did so specifically. In construing different statutory provisions, implied amendments are not to be favored.[13]

E

The Circuit Court of Appeals for the Tenth Circuit, the only other court which has passed on the

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[13] This follows from the settled doctrine that repeals by implication are not favored, for a modification is a partial repeal. Even where there is a positive repugnancy between the provisions of two laws "the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy." *Wood* v. *United States*, 16 Pet. 342, 363; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221. The supposed repugnancy must be especially clear where the repeal would operate to the prejudice of the Government. *United States* v. *The Reform*, 3 Wall. 617, 633. Moreover, the presumption against implied repeal obtains even where the two laws are on the same subject (*United States* v. *Claflin*, 97 U. S. 546, 552; *Rainey* v. *Grace & Co.*, 231 U. S. 703, 709), but in this case the two statutes on their face deal with different concepts.

question at bar, has sustained the Government's position.

In *Paulson* v. *United States*, 78 F. (2d) 97, two suits were filed more than two years after the schedule of overassessments was approved; one was filed within two years of the issuance of the refund check; the other was filed more than two years after the mailing of the refund check but less than two years after the delivery thereof. The Circuit Court of Appeals held both suits timely (p. 99):

> * * * the refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered. Communication with the taxpayer absent, the preceding actions are exclusively intradepartmental or interdepartmental, and may be changed, corrected, revised, or rescinded, as circumstances require. The Commissioner may declare the schedule erroneous or inadvertent and erase his signature from it without violating any rights of the taxpayer. *Daube* v. *United States*, 289 U. S. 367, 53 S. Ct. 597, 77 L. Ed. 1261. Ordinarily a statute of limitation does not begin to run until a suit could be brought. Certainly it cannot be contended that a suit of this na-

> ture may be maintained and judgment secured after the schedule of refunds and credits has been approved, but before the money is paid to the taxpayer.

It is true that in the *Paulson* case, the schedules of overassessment were signed before May 28, 1928, and hence were not affected by Section 1104 of the Revenue Act of 1932, *infra*, p. 43. But it is manifest that Section 1104 would not have evoked a different decision. The court did not even comment on the definition of date of "allowance" of a refund contained in Section 1116 (b) (2) of the 1926 Act. Indeed, the court explicitly rejected the contention that the date of allowance is the date on which a refund is made within the meaning of Section 610 of the Revenue Act of 1928 (p. 99):

> * * * the statute does not provide that the suit shall be filed within two years after the refund is allowed.. On the contrary, it is provided textually that the period shall run from the time the refund is made. The distinction between the act of allowing a refund and that of refunding the money is manifest, and the supposed analogy between the two cited cases and these emphasizes the clear and decisive difference. Congress could have provided that suit must be filed within two years after the refund is allowed; but for reasons sufficient unto itself, it provided otherwise.

That the Circuit Court of Appeals for the Tenth Circuit has persisted in this view even as to sched-

ules signed after May 28, 1928, is indicated by *Smyth* v. *United States,* 92 F. (2d) 900. Although it appears from the record that that suit was filed within two years of the approval of the schedule of refunds, that fact is not disclosed by the opinion, and in the opinion, which treats of the effect of Section 610 of the Revenue Act of 1928, the court states simply that the amount of the overassessment was refunded on January 11, 1932, and that complaint was filed November 9, 1933. It is clearly the date of the actual payment by the Government which the court regards as significant.

This Court has not previously been presented with a question like the one at bar. In several cases it considered the former Bureau practice with respect to the granting of credits and refunds, but the decisions neither discussed nor were concerned with the date of the "making" of a refund. In each of the cases, the pivotal issue was the determination of the date of the "allowance" of a refund or credit, and that is the only date the Court considered. Thus, in *Girard Trust Co.* v. *United States,* 270 U. S. 163, the Court was concerned with the proper construction of Section 1324 (a) of the Revenue Act of 1921, which provided that "upon the allowance of a claim" for refund or credit interest should be paid "to the date of * * * allowance." It selected the date of the signing of

the second schedule (under the Bureau practice then in effect) as the "date of allowance." Subsequent cases ruled that the amount of interest was governed by the Act in force on the date of the "allowance" of the refund (*United States* v. *Magnolia Co.*, 276 U. S. 160; *Blair* v. *Birkenstock*, 271 U. S. 348), and it was in view of these cases, and the necessity of determining which Act governed the interest on certain credits, that the "date of the allowance of the credits * * * [became] important" in *United States* v. *Boston Buick Co.*, 282 U. S. 476, and *Pottstown Co.* v. *United States*, 282 U. S. 479. In *United States* v. *Swift & Co.*, 282 U. S. 468, the date of allowance of the credit had to be determined because the taxpayer could not obtain a refund of a 1917 overpayment unless he had filed his claim within four years from the time the tax was paid, and the 1917 tax had been paid by the crediting of a 1918 overpayment. Since the claim for refund of the 1917 overpayment was filed less than four years after the Commissioner had approved the schedule of refunds and credits directing that the 1918 overpayment be credited against the alleged 1917 liability, it was held that the 1917 refund claim was timely filed. The foregoing cases applied the rule that the date of allowance was the date on which the schedule of refunds and credits was signed. In *McEachern* v. *Rose*, No. 6, present Term, decided November 8, 1937, the Court also discussed the date of allowance of a credit, and

noted that the rule of the decisions discussed above was changed by Section 1104 of the 1932 Act.[14] In that case the Collector attempted to resist a suit for the recovery of overpayments for 1929 to 1931 because of an underpayment for 1928. Since the Commissioner had signed no schedule of overassessments directing any credit of the later overpayments against the earlier underpayment, and certainly had not signed one prior to the date when collection of the 1928 deficiency was barred, the credit had not been made against the 1928 tax liability before the collection of that tax was barred by limitations, and so the credit was void under Section 609 (a) of the 1928 Act.

Thus, in these cases, the Court was called upon to ascertain the date of "allowance." It nowhere indicated that the date of "allowance" was considered the same as the date of the "making" of the refund, a distinct statutory concept.

F

The limitation period is clearly intended to start with the date of payment. But even if there are any doubts as to the proper construction of the

[14] It is perhaps more accurate to say that the change was effected by the adoption of the new Bureau practice in 1927 eliminating the second schedule. Section 1104 of the 1932 Act merely took cognizance of that change and adapted those decisions to the new practice, specifying that the date of allowance is the date on which the Commissioner first signs the schedule of overassessments.

statute, they should be resolved in favor of the Government.

Section 610 is merely a statute of limitations sought to be applied to bar a right of the United States. The rule is clear that such statutes are strictly construed in favor of the United States. *Independent Coal Co.* v. *United States*, 274 U. S. 640, 650; *United States* v. *Whited & Wheless*, 246 U. S. 552. As this Court said in *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462: "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government."

It cannot properly be contended that this rule of construction is inapplicable on the ground that the limitation period of Section 610 is a limitation or condition of a right created by the same section. This is an action for money had and received to recover funds erroneously paid out of the Treasury of the United States to the respondent. The right of the Government to recover such erroneous refunds is quasi-contractual in nature and exists independent of statute. That the 1928 Act is not the source of the right to maintain such a suit is apparent from the decisions recognizing the propriety of such proceedings instituted prior to 1928. *Talcott* v. *United States*, 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604; *United States* v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (Minn.); *United States* v. *Barton*, 35 F. (2d) 765 (S. D.); *Kelley* v. *United States*, 30 F. (2d) 193, 194 (C. C. A. 9th); *Champ Spring Co.* v. *United States*, 47 F.

(2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *United States* v. *Woolner Distilling Co.*, 52 F. (2d) 666, 667, 668 (S. D. Ill.), affirmed, 62 F. (2d) 228 (C. C. A. 7th); *United States* v. *Pusey*, 47 F. (2d) 22 (C. C. A. 9th); *United States* v. *Tuthill Spring Co.*, 55 F. (2d) 415 (N. D. Ill.); *Lindley* v. *United States*, 59 F. (2d) 336 (C. C. A. 9th); *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82, 85 (C. C. A. 2d); *St. Louis Union Trust Co.* v. *United States*, 82 F. (2d) 61, 65–66 (C. C. A. 8th). These cases, recognizing the right of the Government to bring an action for the recovery of an erroneous refund of taxes, are merely examples of the familiar rule that the sovereign may recover sums paid out of the public treasury by mistake either of fact or of law. See *Heidt* v. *United States*, 56 F. (2d) 559 (C. C. A. 5th); *Granzow* v. *Village of Lyons, Ill.*, 89 F. (2d) 83 (C. C. A. 7th); *United States* v. *Dempsey*, 104 Fed. 197 (D. Mont.); Am. Law Institute, Restatement, Restitution, § 46 (a). And this Court has not infrequently adverted to "the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." *Wisconsin Central R'd* v. *United States*, 164 U. S. 190, 212. Cf. *Steele* v. *United States*, 113 U. S. 128; *United States* v. *Burchard*, 125 U. S. 176; *McElrath* v. *United States*, 102 U. S. 426, 440–441; *United States* v. *Stahl*, 151 U. S. 366.[15] Clearly, therefore, Section 610 did not

[15] Other illustrations of the right of the sovereign to maintain an action for money had and received in similar situa-

create the right of action in the Government. It merely confined the previous right of the Government, which was not subject to any limitation of time. It is a statute of limitations, and must be strictly construed in favor of the Government. See *supra*, p. 34.

In the brief in opposition to the petition for certiorari, respondent adverts (p. 13) to "the rule which requires taxing acts, including provisions of limitations embodied therein, to be construed liberally in favor of the taxpayer" (*United States* v. *Updike*, 281 U. S. 489, 496). That rule is applicable in controversies between the Government and a private citizen who is being affected *as a taxpayer*. See *United States* v. *Michel*, 282 U. S. 656, 659. But the doctrine applies only to controversies between the Government and the taxpayer, *as such*, e. g., to controversies where the Government is trying to collect taxes, as in the *Updike* case and *Bow-*

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tions may be found in *City of Demopolis* v. *Marengo County*, 195 Ala. 214; *Gilpatric* v. *Hartford*, 98 Conn. 471; *Independent School Dist. No. 6* v. *Mittry*, 39 Idaho 282; *Ada County* v. *Gess*, 4 Idaho 611; *State* v. *Young*, 134 Iowa 505; *City of Biddeford* v. *Benoit*, 128 Me. 240; *Ellis* v. *Board of State Auditors*, 107 Mich. 528; *County of Wayne* v. *Reynolds*, 126 Mich. 231; *Lamar Township* v. *City of Lamar*, 261 Mo. 171; *State ex rel. Buder* v. *Hackmann*, 305 Mo. 342; *State ex rel. Barker* v. *Scott*, 270 Mo. 146; *County of Erie* v. *Town of Tonawanda*, 95 Misc. 663; *County of Cayuga* v. *State*, 112 Misc. 517; *Bismarck* v. *Burleigh County*, 49 N. D. 205; *Allegheny County* v. *Grier*, 179 Pa. 639; *Frederick* v. *Douglas County*, 96 Wis. 411; *St. Croix County* v. *Webster*, 111 Wis. 270.

ers v. *N. Y. & Albany Co.*, 273 U. S. 346. In the present case, although a tax situation gave rise to the controversy, the Government is not bringing suit against respondent as a taxpayer, but merely as someone to whom an erroneous payment was made. As was said in *Talcott* v. *United States*, 33 F. (2d) 897, 901:

> But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

See also *United States* v. *Bartron*, 35 F. (2d) 765, 768 (S. D.); *Kelley* v. *United States*, 30 F. (2d) 193–194 (C. C. A. 9th); *Champ Spring Co.* v. *United States*, 47 F. (2d) 1, 2–3 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82, 85 (C. C. A. 2d). Indeed in one case (*United States* v. *Standard Spring Mfg. Co.*, 23 F. (2d) 495 (D. Minn.), *supra*), after making the erroneous refund the Government sought to reassess and collect the tax *qua* tax, and after losing that suit it instituted a new proceeding to recover the erroneous refund. The defense of estoppel by judgment was rejected by the court, on the ground that the second suit was not for the recovery of a tax. The court said (pp. 496–497):

> The cause of action asserted by the government in the former suit against the defendant was for the recovery of a tax which it was asserted the defendant was liable to

> pay, but had not paid. The evidence showed that the tax had been paid, but had been erroneously refunded. It is apparent, therefore, that the government could not recover on the cause of action asserted, and its complaint was dismissed for that reason. It thereupon commenced this suit to recover the refund erroneously made. It is not estopped by the judgment in the former action.

Thus, since the Government is proceeding against respondent not as a taxpayer but as one who is "liable *ex aequo et bono* to refund" moneys illegally paid by a public officer, see *Wisconsin Central R'd Co.* v. *United States*, 164 U. S. 190, 212, the canon stated in the *Updike* case does not apply. The case is therefore one for the application of the general principle that statutes of limitations are to be construed strictly in favor of the United States.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

GOLDEN W. BELL,
Acting Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
JOSEPH M. JONES,
Special Assistants to the Attorney General.
HAROLD LEVENTHAL,
Special Attorney.

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APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, * * *

(b) As used in this section—

* * * * *

(2) The term "date of the allowance of the refund" means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on allowance.*—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such

period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * *

SEC. 608. EFFECTS OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional

amount, or addition to such tax), refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

SEC. 614. INTEREST ON OVERPAYMENTS.

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * *

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

* * * * *

(U. S. C., Title 26, Sec. 1671.)

SEC. 710. REFUNDS AND CREDITS TO BE REFERRED TO JOINT COMMITTEE.

No refund or credit of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be made after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to

whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. A report to Congress shall be made annually by such committee of such refunds and credits, including the names of all persons and corporations to whom amounts are credited or payments are made, together with the amounts credited or paid to each. (U. S. C., Title 26, Sec. 1677.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the

amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * * *

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

SEC. 1106. REFUNDS OF MISCELLANEOUS TAXES.

(a) Subsection (a) of section 3228 of the Revised Statutes, as amended, is amended by adding at the end thereof the following:

"The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund." (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 502. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Section 610 of the Revenue Act of 1928 is amended by adding at the end thereof a new subsection to read as follows:

"(c) Despite the provisions of subsections (a) and (b) such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact." (U. S. C., Title 26, Sec. 1646.)

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 803. INTEREST ON ERRONEOUS REFUNDS.

(a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new subsection to read as follows:

"(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum per annum from the date of the payment of the refund." (U. S. C., Sup. II, Title 26, Sec. 1646.)

APPENDIX B

Excerpts from Committee Reports:

S. Rep. No. 52, 69th Cong., 1st Sess., p. 38:

> SEC. 1116. * * * In the case of refunds, interest is allowed "to the date of the allowance of the refund." In practice, the commissioner first signs a schedule of overassessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of overassessments.

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33, 34, 35:

> SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.
>
> If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.
>
> SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> This section relates to the recovery of erroneous refunds as defined in section 608 and also to refunds which are erroneous independently of section 608. The section provides that any erroneous refund, of either class, may be recovered by suit brought in

the name of the United States if such suit is begun within two years after the making of the refund.

SEC. 614. INTEREST ON OVERPAYMENTS.

The principal change made in existing law is that in the case of a refund the interest period now terminates with the allowance of the refund, a date which often precedes the actual making of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the date of the refund.

(S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–43, is to the same effect.)

S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57–58:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself

contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of the small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 act.

SEC. 1106. REFUNDS OF MISCELLANEOUS TAXES.

This section amends section 3228 of the Revised Statutes so as to expressly prohibit refund of the portion of any taxes paid more than four years before the filing of the claim (or allowance of the refund, if no claim was filed).

H. Rep. No. 1492, 72d Cong., 1st Sess., p. 29:

Amendment No. 261: Under this amendment a refund of miscellaneous taxes can

not exceed the amount of the tax paid during the four years immediately preceding the filing of the claim, or, if no claim is filed, then during the four years immediately preceding the allowance of the refund. The amendment provides that it shall not bar from allowance a claim for refund filed prior to the enactment of the bill if such claim would have been allowable had the amendment not been enacted. The House recedes.

H. Rep. No. 704, 73d Cong., 2d Sess., p. 37:

SEC. 502. Recovery of amounts erroneously refunded: This section amends section 610 of the Revenue Act of 1928 so as to give the United States 5 years to bring suit to recover amounts of internal revenue taxes erroneously refunded where any part of the refund was induced by fraud or misrepresentation of the material fact. In all other cases the period is 2 years which is the period provided by existing law without regard to the circumstances under which the refund was made.

APPENDIX C

Authorization of Commissioner appearing on Schedule of Overassessments (Form 7920):

This schedule must be adjusted and all required steps taken IMMEDIATELY.

The amounts listed in column 3 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

The DISBURSING CLERK, Treasury Department, is authorized to pay the amount specified in column 9 or 10, or both.

Date ----------

----------,

Commissioner of Internal Revenue.

The foregoing is set out in full in the sixth finding of fact in *Pacific Coast Biscuit Co.* v. *United States,* 19 F. Supp. 545, 551 (C. Cls.), certiorari denied Oct. 18, 1937, No. 348, present term.

The record in *United States* v. *Iron Cap Copper Co.* (282 U. S. 476, No. 43, Oct. Term, 1930, pp. 26–28), discloses that Form 7920 has been in use since January 1927 and sets out the entire schedule of overassessments containing, in addition to the above, the certificate of the Deputy Commissioner (made prior to the Commissioner's signing of the schedule) recommending the amounts for allowance, and the certificate of the Collector (made subsequent to the Commissioner's signature) that proper amounts have been abated and credited.

APPENDIX D

Paul and Mertens, Law of Federal Income Taxation, Vol. 5:

SEC. 42.25. *Procedure in the Case of Overassessments.*—Where the Commissioner determines that the amount of the tax assessed against a taxpayer for a particular taxable period is in excess of the correct tax due, a certificate of overassessment is prepared and entered on a schedule of overassessments which contains the letters "IT" indicating that it is an income tax schedule of overassessments, followed by the number of the schedule. This schedule is signed by the Commissioner and forwarded to the Collector. Upon receipt in the Collector's office, the overassessment is checked against the Collector's records of assessments against the taxpayer for the year involved.

If there is any assessment for such year which has not been paid, the amount of the overassessment, or a portion thereof equal to the unpaid amount, is abated. The abatement consists merely of entering the amount in the credit column of the particular assessment list opposite the taxpayer's name with an explanation of the fact that it is an abatement and a reference to the schedule number in the remarks column.

If there still remains a portion of the overassessment after abating all unpaid assessments for the particular year, the Collector will then check his records, using the alphabetical control cards, made up as explained

above, to ascertain whether there are any unpaid assessments against the taxpayer for other years. If so, the overassessment is applied against such unpaid assessments for the other year or years. This is, of course, a credit and the appropriate explanation is made in the remarks column of the assessment list.

If the amount of the overassessment is in excess of any and all unpaid assessments, the amount of the excess is certified by the Collector as a refundable overpayment. When the action by the Collector is thus completed the certificates of overassessment and the schedules are returned to the Bureau. Upon receipt in the Bureau of the certificates of overassessment and the schedules showing the action by the Collector, the Clearing Division of the Income Tax Unit at Washington makes a computation of interest, if any, to be allowed on any overpayment.

After the interest has been computed, the schedule, and certain other related documents, are forwarded to the General Accounting Office for a pre-audit review. If the General Accounting Office discovers no reason for disallowing the refund, the schedule and related documents are referred back to the Income Tax Unit, after which they are sent to the Accounts and Collections Unit of the Bureau of Internal Revenue to be charged against the congressional appropriation provided for the refunding of taxes erroneously collected. After it has been charged against the proper appropriation, a check is drawn by the Chief Disbursing Officer in favor of the taxpayer, and is forwarded to the Collector along with the certificate of overas-

sessment. The Collector's office then makes another examination to ascertain whether there are any unpaid taxes due from the same taxpayer, and requires a statement from the payee as to his tax liability to the Government. If no Federal taxes are found to be due and payable, the check is then forwarded to the taxpayer together with the certificate of overassessment.

The Collector's monthly statements are, of course, kept up to date by appropriate postings to reflect all abatements, credits and refunds.

U. S. GOVERNMENT PRINTING OFFICE : 1934

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent's brief proceeds in large part upon the argument that Section 610 (b) applies to credits as well as refunds, that the effective date of a credit is the date of "allowance" (*United States* v. *Swift & Co.*, 282 U. S. 468), and that therefore the date of the "making" of a *refund* must also be the date of "allowance." Otherwise, contends respondent, the two year period would begin to run from one date in the case of credits and from another date in the case of refunds—a result that is said to be inadmissible.

This reply brief is filed in response to those contentions since they are predicated upon a major premise that is wholly false. Respondent seriously

errs in suggesting that Section 610 is applicable to credits.

Section 610 is entitled "Recovery of Amounts Erroneously Refunded." Throughout it deals only with a tax which has been "erroneously refunded," and prescribes the period within which suit may be instituted for the *recovery* of "such refund." Nowhere is there any suggestion that it applies also to credits which have been erroneously allowed.

The procedure followed to correct an erroneous credit is entirely different and must be sharply distinguished from suits to recover an erroneous refund. Whenever it is discovered that the Commissioner has erroneously determined an overpayment of a tax and has credited the amount against another tax then due, the credit is expunged. The Government then proceeds, if possible, to collect the tax against which the erroneous credit was made. No suit is ever brought to "recover" an erroneous credit.

A letter from the Commissioner of Internal Revenue, which sets forth the administrative practice in this regard, has been filed with the Clerk, and is reproduced, *infra*, in the Appendix, p. 5.

Accordingly, Section 610 (b) by its very nature deals exclusively with refunds. There is, therefore, no possibility of any inconsistency in the date from which the period of limitations is to be measured, since Section 610 (b) has nothing whatever to do with credits, nor is there any other provision of

law which limits the time within which an erroneous credit may be eliminated. In the case of an erroneous credit the taxpayer is accorded repose by the statute of limitations regulating the collection of the tax against which the erroneous credit was made. The credit itself may be reversed at any time.

Considerable confusion has arisen in the attempted application of *United States* v. *Swift & Co.*, 282 U. S. 468, to the present case. In the *Swift* case the taxpayer was suing to recover a tax which had been paid by means of credit. The question there was whether the claim for refund had been filed in time to maintain the suit, and that question in turn depended upon when the tax was paid. This Court held that it was paid upon the date of allowance of the credit, which was the date upon which the Commissioner signed the appropriate schedule. Thus, in the case of credits, the date of allowance constitutes the date of *payment* of the tax against which the credit is taken. This is because the *allowance of a credit is the operative act* which effects the discharge of the taxpayer's liability upon the other tax. Allowance in case of a credit is, therefore, payment. That is all that was decided in the *Swift* case. In sharp contrast, however, allowance in the case of refund is *not* payment. See *Daube* v. *United States*, 289 U. S. 367.

It is our contention that the "making" of a re-

fund within the meaning of Section 610 (b) must be payment. In the case of credits, the date of allowance and the date of payment are the same, since the allowance is the operative act of the Commissioner which discharges the other liability. With respect to refunds, on the other hand, allowance is merely a step that precedes the actual *making* of the refund.

Respectfully submitted.

GOLDEN W. BELL,
Acting Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
J. LOUIS MONARCH,
ARNOLD RAUM,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

FEBRUARY 1938.

APPENDIX

Letter of the Commissioner of Internal Revenue on administrative practice with respect to erroneous credits:

TREASURY DEPARTMENT

WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:C1:ECW

FEB. 5, 1938.

Honorable JAMES W. MORRIS,
Assistant Attorney General,
Department of Justice.

Attention: Mr. Arnold Raum.

SIR: With respect to your recent informal request for information as to the application, in practice, of Section 610 (b) of the Revenue Act of 1928 to credits, you will, of course, note that the language of the section limits its effect to amounts "erroneously refunded." This Bureau has consistently construed said section as not applying to credits.

The practice, in the case of erroneous credits, has been to eliminate or reverse the credit and proceed with the collection of the tax to which the credit had been erroneously applied, unless the limitation on collection had expired, in which event collection could not be legally enforced.

Being of the opinion that there is no legal basis for maintaining a suit for the recovery of an erroneous credit, this Bureau had never requested or recommended that such a suit be brought, and is not aware of any suit having been instituted for the recovery of an erroneous credit.

Respectfully,

[Signed] GUY T. HELVERING,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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No. 499.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT K. WURTS.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The respondent denies that petitioner is entitled to a Writ of Certiorari.

COUNTER-STATEMENT OF QUESTION PRESENTED

Under a statutory provision creating a right of action in the United States to bring suit to recover a refund of taxes "but only if such suit is begun before the expiration of two years after the making of such refund," is the

above quoted condition complied with when suit is started more than two years after the date on which the Commissioner of Internal Revenue approves the schedule of overassessments[1] although less than two years after the date of delivery of the refund check.

REASONS FOR DISALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals, and is harmonious with prior decisions of the United States Supreme Court. The question presented is not of sufficient importance to warrant a writ of certiorari.

ARGUMENT

1. The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals.

The United States, in its argument and brief in the District Court relied wholly on the case of *Paulson v. U. S.*, 78 Fed. (2nd) 97 (C. C. A. 10th) (1935), and in its brief and

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[1] The "*Question Presented*" as found on page 2 of the petition erroneously refers to the "schedule of refunds and credits." Under the practice prevailing throughout this case, the last act of the Commissioner consisted of the signing of the schedule of overassessment. Previously, it was the practice for the Commissioner to first sign the schedule of overassessments, and subsequently after Collectors had made appropriate adjustments to the taxpayer's account, to sign the schedule of refunds and credits. There is no schedule of refunds and credits involved in the present case. A full explanation of the previous and present practice is found in the Senate Finance Committee Report in reference to Section 1104 of the Revenue Act of 1932 (*infra*, p. 16).

argument before the Circuit Court of Appeals relied heavily on this case. The District Court, in its opinion sur rule for judgment, held that the Paulson decision is inapplicable, stating (R. 25), "As the Paulson case was determined under the provisions of the prior acts, and the instant case is to be determined under the latter amendment, it follows that the Paulson ruling does not apply." Similarly, in its decision the Circuit Court of Appeals held that (R. 36) "The case of Paulson v. United States, 78 Fed. (2nd) 97, involved refunds which did not come within the period prescribed in the Revenue Act of 1932 and is therefore inapplicable."

In the Paulson case the schedules of overassessment were signed before May 28, 1928, and consequently were not affected by Section 1104 of the Revenue Act of 1932 which provides that the date when the Commissioner "first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax" (U. S. C. Title 26, Sec. 1670). In the present case, the schedule was signed on March 15, 1932. It seems clear, therefore, that the decision in this case is not in conflict with the Paulson decision. It seems equally clear that no confusion is likely to arise because both lower courts in the present case expressly distinguish the Paulson case on its facts, and for the reasons stated.

2. The decision of the Circuit Court of Appeals is in harmony with prior decisions of the United States Supreme Court.

The argument of the United States is based upon the erroneous assumption that Section 610 (b) of the Revenue Act of 1928 is a statute of limitation, from which it is as-

sumed that the period of limitation would not start to run until the cause of action arises—*i. e.* the date of the delivery of the refund check, just as if the two year period under consideration were to be found in a general statute of limitations entirely apart from the very section in question only under which the present action could be brought. That the statutory remedy is exclusive was held in *Hartford Connecticut Trust Co. v. Eaton*, 8 Fed. Supp. 218 (1934), in the following terms, at page 220:

> "* * * The refund (involved in this case) * * * would have been an erroneous refund, for which the Commissioner had only one redress fixed by statute. He should have brought suit within two years after the refund for the amount alleged to have been erroneously refunded. Sec. 610, Revenue Act of 1928 (26 U. S. C. A., Sec. 2610)."

Section 610 (b) is not a statute of limitations. It imposes a condition on the cause of action. It was so held by the District Court in the present case in its opinion sur statutory demurrer (R. 17) and in its opinion sur rule for judgment (R. 22) and by the Circuit Court of Appeals in its opinion wherein it states (R. 36), "The United States is given statutory leave to recover refunds, but only upon the condition that the action be brought within two years from the date of the signing of the schedule of overassessment." Since Section 610 (b) imposes a condition there is no occasion or reason to inquire when the cause of action may have arisen, and it is neither surprising nor illogical that the period might start either before or after the cause of action arises or while the fund which is in dispute is still in the Treasury. On the contrary, it is entirely logical that the period starts when the schedule of overassessment is signed by the Commissioner, this being the last administra-

tive act of the only official who has the power to dispose of such cases on their merit. The drawing of the check is ministerial. Since we are dealing with a condition, it becomes immaterial whether the Commissioner may or may not later "head off" or recall the check drawn in payment.

The contention of the United States in the present case is similar in principle to contentions previously denied by the United States Supreme Court, whereas the decision of the Circuit Court of Appeals is wholly in harmony with these prior decisions which, it is believed, deal with cognate matters or subjects.

In *Girard Trust Co. v. United States,* 270 U. S. 163, (1925), the question arose as to the interpretation of the Revenue Act of 1921 which provided that, upon the allowance of a claim for refund, interest shall be allowed and paid "to the date of such allowance." The Supreme Court held that the date in question was not the date of actual repayment, nor the date on which the Commissioner first decides that there has been an overassessment and thereupon refers the matter to the Collector for examination and report, *but the date on which the Commissioner approves the amount thus ascertained for payment.*[2]

The Court further points our (page 169):

> "If Congress had intended that interest should be allowed to the date of payment, it seems to us it would have said so."

Similarly, if Congress had intended that the period provided in Section 610 (b) of the Revenue Act of 1928 should begin on the date of payment, it seems that it would have

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2 Under the practice prevailing throughout the present case, this would correspond to the date when the Commissioner signs the schedule of overassessments. To avoid confusion, it should be noted that the *Girard* case arose prior to the change in procedure discussed and explained in the Senate Finance Committee Report regarding Section 1104 (*infra*, p. 16).

said so. That the word "making" is not used in the sense of payment becomes even more obvious when consideration is given to the amendment to this very Section by Section 803 of the Revenue Act of 1936. This amendment reads as follows:

> "Section 803. Interest on Erroneous Refunds.
> (a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new section to read as follows:
>
> '(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum from *the date of the payment of the refund.*'" (Italics ours)

According to established principles of statutory construction, this change in phraseology in the same section from the word "making" to the word "payment" clearly imports a difference in meaning.

In *United States v. Swift & Co.*, 282 U. S. 468 (1930), the original plaintiff, Swift & Co., filed a claim for refund of a sum which had not been paid in cash but which consisted of a credit of an amount previously overpaid. Under the applicable statutes (Section 252 of the Revenue Act of 1921, 42 Stat. 268, and Section 284 (b) (1) of the Revenue Act of 1926, 44 Stat. 66, 26 U. S. C. A. 1065), as set forth in the report of the case, the plaintiff was required to file his claim within four years from the date of the allowance of the credit, and the court was required to determine at what date a credit is allowed for the purpose of determining whether the condition, as to when the claim must be filed, had been complied with. Particular attention is directed to the fact that both statutes involved in this case contain the expression, "no such credit or refund

shall be *allowed or made*'' after certain designated dates. The court picked that date as of which the Commissioner approved the schedule of refunds and credits for the reason that the court considered that to be the last administrative act in reference to perfecting the claim for refund.[3]

In arriving at this conclusion, the court in the *Swift* case quotes with approval from *Girard Trust Co. v. U. S.*, 270 U. S. 163, at page 170, as follows:

> ''The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.''

The Government, in the *Swift* case, sought to differentiate the *Girard* case on the ground that there the date of the allowance of a refund was in question; whereas, the Swift case involved the allowance of a credit. In denying that any such distinction exists the court states:

> ''This construction'' (*i. e.*, the court's) ''of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous.''

Since the above statement was made regarding sections of the statute which specifically refer to credits or refunds as being ''allowed or made,'' it constitutes a holding by the Supreme Court that in point of time there is no distinction under the statutes between the allowance or mak-

---

[3] As in the *Girard* case, this would again correspond to the date when the Commissioner signed the schedule of overassessments since the *Swift* case also arose prior to the change in procedure, but is no less in point on that account. See Footnote 2.

ing of credits or refunds; that both result from the same administrative act.

The contention of the United States in the present case involves precisely the same sort of inconsistency condemned by the Supreme Court in the *Swift* case, *supra*. This would result under numerous closely related and interdependent sections of the Revenue Acts. For instance, Section 322 (b) of the Revenue Act of 1934 provides that unless a claim for credit or refund is filed within three years after the return was filed or within two years after the tax was paid no credit or refund shall be "allowed or made" after the expiration of whichever of such periods expires the later. Whether an overpayment results eventually in a credit or a refund depends entirely upon the purely fortuitous circumstance of the status of the taxpayer's account at the time the overpayment is determined, and this is neither known nor determined by the Treasury Department until after the fact of overpayment has been determined by the Commissioner on the merits. Still, the United States argues, substantially as it did in the *Swift* case, that a distinction exists in point of time between credits and refunds.

This contention would, if sustained, inject similar uncertainties and conflict respecting other related Sections of the Revenue Acts in addition to Section 322 (b). For further illustration, Section 322 (b) of the Revenue Act of 1934 (with immaterial exceptions the same in Revenue Acts of 1928 and 1930), also provides in part:

> "(1) * * * No credit or refund shall be *allowed* or *made* after two years from the time the tax was paid * * *
>
> "(2) The amount of the credit or refund shall not exceed the portion of the tax paid * * * during the

three (two years, prior to 1934) years immediately preceding the *allowance* of the credit or refund."

Section 322 (d) provides, in part:

"(d) * * * No such credit or refund shall be *made* of any portion of the tax unless * * *, &c." (Italics ours.)

From the foregoing it seems that, generally speaking, credits are "allowed" and refunds are "made." In the single section just quoted, credits are referred to as being "allowed" and refunds as "made"; both credits and refunds are then referred to as "allowed"; and finally, both are referred to as being "made." The conclusion is irresistible that the words are used interchangeably and entirely without any distinction in meaning.

Again, if the distinction urged by the United States between the time when a refund is "allowed" and the time when it is "made" is sustained, it would defeat the very purpose of the enactment of Section 1104, so far as refunds are concerned, as clearly explained by the Senate Finance Committee Report in reference to that Section (*infra*, p. 16).

This is clear when Section 1104 is read in conjunction with Section 322 (b) (1) of the Revenue Act of 1932. The latter section relates to refunds and credits and provides:

"Section 322. Refunds and Credits.

(b) Limitation on Allowance.

(1) Period of Limitation.—No such credit or refund shall be *allowed or made* after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer." (These provisions were changed by

amendment in 1934, but the changes in no way affect the point under discussion.) (Italics ours.)

Section 1104 (*infra*, p. 15) fixes the "date of *allowance* of refund or credit" as the date when the Commissioner first signs the schedule.

The Senate Finance Committee explains (*infra*, p. 16) that the purpose of enacting Section 1104 was not only to clarify the date in question in view of the change in the administrative procedure, but also to protect taxpayers who might not be aware of their right to a refund in time to file their claim within two years after the tax was paid. Under Section 322 (b) (1), just quoted, either the taxpayer must file his claim within two years after the tax is paid or the Commissioner must *make* the refund within that period. If the purpose of Section 1104 is to permit the Commissioner to accomplish a refund at the earlier date by signing the schedule (and the Senate Finance Committee Report declares this to be the purpose) and thus favor small taxpayers who might not be aware of their rights, then it must follow that a refund is "made" when it is "allowed." A contrary construction would nullify the purpose of Section 1104 by postponing the "making" of the refund until the later date when payment occurs, and the effect of Section 1104 as desired and intended by Congress would thus be lost, because it might then be too late legally to *make* the refund. Such a contrary construction should be avoided, as a statute should be construed in a sense that will effect the legislative purpose, *U. S. v. Katz*, 46 S. Ct. 513, 271, U. S. 354. Committee Reports in explanation of the purpose and design of specific provisions of the Revenue Acts are considered as deserving of peculiar authority in the construction of such provisions; *Hecht v. Malley*, 44 S. Ct. 462, 265 U. S. 144; and reference

is frequently made to them, *Burnet v. S. & L. Building Corp.*, 53 S. Ct. 428, 288 U. S. 406.

The foregoing will serve to illustrate some of the several provisions of the Revenue Act using the words "allowed" and "made," and all of which relate to some aspect of credits or refunds. In the illustrations given, to which others could be added, the meaning of the word "made" as contended for by respondent seems beyond doubt. Respondent understands that the United States does not deny this, but insists that its meaning is different in the single Section 610 (b) of the Revenue Act of 1928. Such a position is untenable. In construing one section of the Revenue Act containing certain words or phrases, the court may and should resort to other provisions containing the same words or phrases. "In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this meaning will be attached to it elsewhere." 59 *C. J.* 1003, citing *Pampanya Sugar Mills v. Trinidad*, 49 S. Ct. 308, 279 U. S. 211, 73 L. Ed. 665 (1929), and *Llewellyn v. Harbison*, 31 F. (2nd) 740, cert. den. 50 S. Ct. 18, 280 U. S. 560 (1929). As something in the statute indicating a contrary intent, the United States claims that Section 1104 of the Revenue Act of 1932 and Section 610 of the Revenue Act of 1928 are not in *pari materia*, and that the former in no way modifies the latter, and on page 5 of its petition quotes the Report of the House Committee on Ways and Means in explanation of Section 614 of the Revenue Act of 1928 which amended Section 1116 (b) (2) of the Revenue Act of 1926 which, until the 1928 amendment, contained a definition of "date of allowance of refund" similar to that now contained in Section 1104.

It should be observed first that the definition of "date of allowance of refund" in Section 1116 (b) of the Revenue Act of 1926 was expressly limited in its application to that Section of which it was a part and which dealt with interest. As pointed out in the footnote on page 6 of the petition, this definition dropped out of the Act of 1928. But by way of contrast, Section 1104 of the Revenue Act of 1932 is a complete Section in itself, and is not limited to any particular aspect of credits and refunds such as interest.

It should be observed next that from this same House Committee Report the conclusion is drawn by the United States that the Report evinces the understanding of Congress that the "making of the refund" takes place when payment is actually made subsequent to the signing of the schedule. Assuming that this report is relevant to the question of statutory construction now before the court, respondent submits that the Report in question leads to a conclusion quite contrary to that contended for by the United States. It will be noted that the part of the Report quoted by the United States has to do with the question of interest upon a refund and points out that prior to the amendment discussed in the Report, the allowance of the refund may be on a date which often precedes "the *actual* making of the refund by a considerable period of time and thus deprives the taxpayer of interest during that period." The use of the word "actual" immediately before the words "making of the refund" indicates clearly that the Report has in mind a distinction between the "making of the refund" in the statutory sense and the "actual making of the refund" in the sense of the actual payment of the refund. If the refund is "made" in the statutory sense when the check is delivered to the taxpayer, logically the interest should run to the date of delivery of the check because the refund would not be

"made" in the statutory sense until the delivery of the check. Per contra, the amendment under discussion in the Report limited the interest period to a date not more than thirty days preceding the date of the refund check, such date to be determined by the Commissioner. Obviously, the "making" of the refund was determined by the Commissioner at the same time, so that until the refund was made in the statutory sense the amount of interest and the period for which it should run could not be determined by the Commissioner.

Finally, if the Circuit Court of Appeals in the present case entertained any doubt on the point in issue, it correctly resolved such doubt against the United States and in favor of the respondent.

United States v. Updike, 281 U. S. 489 (1930), involves an interpretation of Section 278 (d) of the Revenue Act of 1926 relating to the limitations on the bringing of suits by the Government after assessment. In holding that the suit in question was barred the court states, at p. 496:

> "* * * We think this is the fair interpretation of the clause, and one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitations embodied therein*, to be construed liberally in favor of the taxpayer. *Bowers v. New York & Albany Co.*, 273 U. S. 346, 350." (Italics ours.)

And in *United States v. Steel Furniture Co.*, 74 Fed. 744 (C. C. A. 6th Cir.) (1935), referring specifically to Section 610 of the Revenue Act of 1928, the court states:

> "The statute was evidently enacted to grant taxpayers repose from suits for erroneous refunds made by the Government. Being a part of a taxing act, it

is to be given a liberal construction in favor of the taxpayer. W. P. Brown & Sons Lumber Co. v. Commissioner, 38 F. (2nd) 425, 428, so far as it is to be construed as holding differently, must be deemed to have been overruled by Bowers v. New York & Albany Co., 273 U. S. 346, 350, and United States v. Updike, 281 U. S. 489, 496."

3. The question presented is not of sufficient importance to warrant a writ of certiorari.

If the petition for writ of certiorari is denied, the United States may correct the situation in all future cases by the simple expedient of starting such actions to recover erroneous refunds within the time required by law. It would not even be necessary to incur the inconvenience of having the statute amended.

Respondent submits, therefore, that the writ of certiorari prayed for should be denied.

Respectfully submitted;

RUSSELL DUANE,
DUANE, MORRIS & HECKSCHER,
Attorneys for Respondent.

SANFORD D. BEECHER,
ARCHIBALD T. JOHNSON,
Of Counsel.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

"SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * * * * * *

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)"

Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)"

Extract from Report of Senate Finance Committee having reference to Section 1116 of the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38):

"In the case of refunds, interest is allowed 'to the date of the allowance of the refund.' In practice the commissioner first signs a schedule of over-assessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of over-assessments."

Extract from Report of Senate Finance Committee having reference to Section 1104 of the Revenue Act of 1932 (S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 57-58):

"Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new

practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 Act."

Extract from Report of House Committee on Conference (H. Rep. No. 1492, 72d Cong., 1st Sess., pp. 28-29):

"Amendment No. 259: This amendment makes it clear that credits or refunds are to be considered as allowed on the date on which the commissioner first signed the schedule of overassessments, provided the schedule was signed after May 29, 1928; and the House recedes."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1937. No. 499.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT K. WURTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent.

Samuel P. Rotenberg,
Gladys G. Spruill,
1611 Land Title Bldg.,
Philadelphia, Pa.,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1937. No. 499.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT K. WURTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 9-11) is not reported. The opinion of the Circuit Court of Appeals (R. 15-16) is reported in 91 F. (2d) 547.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 16). The petition for a writ of

certiorari was filed on October 13, 1937, and was granted on November 15, 1937 (R. 17).

The jurisdiction of this Court is invoked by virtue of the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

> Sec. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.
>
> * * * * * * * *
>
> (b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Additional statutory provisions which are deemed to be essential to a proper determination of the question presented are quoted in the argument and set out in Appendix A, infra p. 33.

SUMMARY OF ARGUMENT.

Section 610 (b) of the Revenue Act of 1928 provides that where a tax has been erroneously refunded, it may be recovered by suit brought in the name of the United States "but only if such suit is begun before the expiration of two years after the making of such refund." Respondent contends that the "making" of a refund occurs

when the Commissioner approves the Schedule of Overassessments. This is the only construction of this phrase which will bring Section 610 (b) into harmony with all other sections of the Revenue Acts touching the subject. The United States contends that the "making of such refund" occurs only on the date of payment, a construction which throws the section out of harmony with all such other sections.

The basic argument for the United States throughout this case has been that Section 610 (b) is merely a statute of limitations, and that consequently the period cannot or should not start until payment because the cause of action to recover such payment does not arise until that time. At first blush, this contention appears to be plausible. But on second thought, as respondent will endeavor to show, it will be realized that the phrase "making of such refund" has a definite and unmistakable statutory meaning which fully supports respondent's contention.

The weight of the Government's argument on behalf of the United States rests wholly upon the two following premises which the United States appears to assume without discussion:

1. That Section 610 (b) relates only to instances where the "refund" in question takes the form of an actual repayment to the taxpayer;

2. That the statute in question is the same as an ordinary statute of limitations.

Both of these assumed premises are fallacious.

Regarding the first premise, the word "refund" as used in Section 610 (b) is not confined in its meaning to restitution by monetary payment. It is not there used in contra-distinction to "credit". Where the Commissioner has applied an erroneous credit, his remedy is to bring suit under Section 610 (b) or to assess a deficiency of the

tax if the time for doing so has not expired, and if the time has expired, his sole remedy is under Section 610 (b). Thus, the word "refund" in this section is used as descriptive of the act of the Commissioner in determining that there has been an overpayment. This act of the Commissioner occurs when he approves the Schedule of Overassessments.

This court and the lower courts have held (in cases more fully discussed in argument) that the crediting of an overpayment is payment of the tax against which such credit is applied, and, that payment in such cases occurs when the Schedule of Overassessments is signed by the Commissioner. Even assuming in full the Government's own analogy between Section 610 (b) and an ordinary statute of limitations, it would follow that in cases of credits, the two year period starts when the Commissioner approves the schedule of overassessments. Is a distinction to be made in this respect between refunds which result in credits and refunds which result in cash payments? Such a distinction, similar in every practical aspect, between "refunds" which result in credits and those which result in refund by actual payment was urged by the Government in *U. S. v. Swift & Co.*, 282 U. S. 468, but denied by this court in favor of a construction of the act which "brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous".

Regarding the second premise, stated supra, on which the Government's main argument appears to be based, what has already been said illustrates in part the fallacy in assuming that Section 610 (b) is the same as an ordinary statute of limitations. An ordinary statute of limitations assumes that a cause of action has arisen, but cannot be enforced if the defendant pleads the statute in bar. Section 610 creates a statutory right for recovery by suit for erroneous refunds conditioned upon beginning suit within two years—not after the cause of action arises, but within two years after the "making of such refund".

The fallacy of the Government's argument arises from postulating that no recovery by suit can be had until payment (true); that therefore the limitation period must run from the time of payment (false); and that therefore the phrase "making of the refund" must refer to the time of payment (false). This reasoning begs the question because it ignores the fact that the "making of such refund" does not refer to time, but to an act with respect to which actual payment to the taxpayer may be the consequence, or may not be the consequence as in the case of a credit. This is true whether Section 610 be construed as a statute of limitations or as a condition which must be affirmatively shown to be complied with to support the right of recovery. We need look no further than the Revenue Act itself to find further illustrations of the same situation. For many years the Revenue Acts provided that the time within which a taxpayer could institute proceedings for refund started "from the date when the return was due". Section 252 of the 1918 Act, c. 18, 40 Stat. 1057; Sec. 252 of the 1921 Act, c. 136, 42 Stat. 227. Under the Revenue Acts now in effect, the period starts with the filing of the return or the date of payment, whichever is most advantageous to the taxpayer. These afford additional instances wherein the time to institute proceedings for recovery of an erroneous payment may start before payment has been made, and illustrate that the fixing of such dates are purely matters of arbitrary statutory determination.

It is immaterial and argues neither one way nor the other that the Commissioner remains in control of the situation for a period after the Schedule of Overassessments has been signed, and could prevent delivery of the check or cause payment to be stopped. To advance this as an argument against respondent is to assume the point to be proved. If the "making of such refund" occurs when the Schedule of Overassessment is approved, the power of the Commissioner to head off the check before delivery is a

circumstance amounting to no more than an additional remedy available to him by way of self help, making it unnecessary to bring suit. On the other hand, if the "making of such refund" occurs with payment, then of course it follows that he could exercise such power before the refund is made. The question still remains, when does the "making" of a refund occur, and if it does occur when the Schedule of Overassessments is approved, as respondent contends, it is immaterial that the Commissioner continues to have power to undo it, for the legal effect of an act of the Commissioner performed under statutory authority must be fixed as of the time the act is done, and cannot be affected *nunc pro tunc* by some subsequent event.

For these reasons respondent submits that no proper analogy can be drawn between Section 610 (b) and an ordinary statute of limitations. The Section should not and cannot intelligibly be viewed or construed as a separate statute. If construction is necessary, resort should be had, not to such analogies drawn from other and unrelated fields of the general law, but to the Revenue Acts of which it is a part.

The foregoing states in outline the reasons why respondent believes that the two main premises on which the Government's principal contention is based are without merit.

A reference to other sections of the Revenue Acts dealing with cognate matters shows unquestionably that the "making of such refund" occurs when the Schedule of Overassessments is approved. This is the only construction of this phrase in Section 610 (b) which will bring that section into harmony with all other sections of the Revenue Acts touching the subject, not in harmony merely with respect to the technical meaning of words, but in harmony with respect to actual operation, purpose and effect, whereas the Government's contention throws the section out of harmony with all such other sections.

The Circuit Court in the present case referred to Sec-

tion 1104 of the Revenue Act of 1932 (and House and Senate Committee Reports in regard thereto) which provides that the date of the "allowance" of a refund is the date when the Commissioner approves the Schedule of Overassessments. The Court states that this section as explained by the Committee Reports lends "additional weight to the theory that the refund is made when the schedule of overassessments is signed." The determination of the issue presented to this court does not depend merely on the question whether Section 1104 is or is not applicable. Respondent does not rely on Section 1104 in the sense that it amends Section 610 (b). Respondent believes that the making of a refund occurs when the Schedule of Overassessments is signed, for numerous reasons independent of Section 1104, but submits that Section 1104 serves to remove any doubt there may otherwise have been in this respect. Respondent's position here is that if Section 1104 is applicable then the Circuit Court was correct in its conclusion for that and other reasons.

By its contention the Government would appropriate to itself the power to delay indefinitely the "making" of a refund, if the quoted word means "payment". This would inject into the administrative procedure a floating time element which would break the otherwise perfect continuity of time between the time of payment by the taxpayer and the expiration of the time within which the Government could sue to recover its erroneous refund. Under respondent's version, there is a beginning and an end fixed by the statute,—each successive time period starts where the preceding one left off. This imparts to the statute the highly desirable element of certainty. Under the Government's version the Commissioner could delay indefinitely in permitting the refund check or the certificate of overassessment to be delivered, although the claim had long since been approved on its merits. Furthermore, respondent's contention is more favorable to the Government than its own, from the point of view of administrative convenience. The time when the Schedule of Overassessments is approved is

peculiarly within the knowledge of the Commissioner as it is a matter of record in his own office, and readily available at all times. It is a time certain. The time when payment occurs is peculiarly within the knowledge of the taxpayer. The period in question runs against the Government,—not the taxpayer. Also, the time of payment is not a time certain. In the present case, the Government argued before the District Court that the date of the refund check controls. Before the Circuit Court it argued that the date of the delivery of the refund check is the controlling date. Before this court it is arguing that it is the date of "payment", whatever that may mean. Is the Commissioner to enquire from taxpayer when he received the check,—or ferret out the check voucher to determine when it was cashed? This is not merely a question of repose to taxpayers. If it is appropriate for the Government to argue what the law should be instead of what the statute provides, then it is equally appropriate for respondent thus to point out that his contention would result both in greater administrative convenience and in greater certainty.

If this court is of the opinion that Section 610 (b) is of doubtful meaning, such doubt should be resolved in favor of the taxpayer and against the Government. The usual rule requiring that a liberal construction favorable to the sovereign be given to statutes in derogation of sovereign rights has no application in the case of revenue laws. This court held in *U. S. v. Updike*, 281 U. S. 489, 496, that the rule requiring taxing acts to be construed liberally in favor of the taxpayer is equally applicable to provisions of limitations embodied in such taxing acts, and the rule of the Updike case has already been applied to Section 610 (b) itself by the Circuit Court of the Sixth Circuit.

ARGUMENT.

THE MAKING OF THE REFUND OCCURRED WHEN THE COMMISSIONER SIGNED THE SCHEDULE OF OVERASSESSMENTS.

A.

The Government's main contention in this case is that the period of limitations for the recovery of an erroneous refund should start with payment of the amount sought to be recovered, as that is when the cause of action would accrue, and that consequently the word "making" as used in Section 610 (b) of the Revenue Act of 1928, infra p. 37, should be construed to mean "payment". Section 610 (b) provides that such actions may be brought in the name of the United States "but only if such suit is begun before the expiration of two years after the making of such refund . . . ."

In both lower courts the first reaction appeared to favor this contention, the mere statement of which seems plausible enough, but on second thought both lower courts experienced a change in opinion and sustained respondent's contention that the "making of such refund" occurs when the Commissioner signs the Schedule of Overassessments.

The Government's analogy to the usual or ordinary statute of limitations assumes the propriety of wholly removing Section 610 (b) from its proper position in the sequence of other sections of the Revenue Acts dealing with cognate matters, and treating the section as if it were a separate and complete statute in itself. Respondent believes this is an entirely unwarranted approach to the problem and that Section 610 (b) should be recognized as what it is and what it was intended to be,—an integral part of a Revenue Act, dealing with but one of several phases of the general subject of overpayments. That this is the proper principle seems all the more clear when the very words in question are found in numerous other sections of the Rev-

enue Acts. Respondent's approach to the problem recognizes this principal, and respondent's construction of the phrase "making of such refund" is the only construction which will bring Section 610 (b) into harmony with all other sections of the Revenue Acts dealing with the subject. At the same time, respondent believes and will show that the Government's construction of the words in question would throw Section 610 (b) out of harmony with such other sections.

The phrase "making of such refund", as used in Section 610 (b) of the Revenue Act of 1928, has a definite statutory significance which involves not only the meaning of the word "making" but also the meaning of the word "refund". These words, as previously stated, are also found in numerous other sections of the Revenue Acts, resort to which may and should be had in order to discover their meaning. "In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this will be attached to it elsewhere." 59 C. J. 1003, citing *Pampanga Sugar Mills v. Trinidad,* 279 U. S. 211, and *Lewellyn v. Harbison.* 31 F. (2nd) 740, cert. den. 280 U. S. 560.

A comparison of Sections 607, 608 and 609 of the Revenue Acts of 1928 (infra pp. 35, 36) and of cetrain other sections, as indicated, will show that the word "refund" is used throughout the Revenue Acts with distinctly different meanings.

Section 607 defines certain overpayments, and directs that they be "credited or refunded." Here, the word "refunded" is used in the sense of "repaid in cash". Section 608 provides that a "refund . . . made" after the enactment of the 1928 Act shall be considered "erroneous" under certain defined conditions. Here, the word "refund" is not confined in its meaning to "repaid in cash." As used here it refers to the fact of overpayment, and the act of the

Commissioner in determining such fact, which is to be adjusted as directed in Section 607 by being "credited or refunded (repaid in cash)." In other words, Section 608 deals with certain erroneous "refunds" which have either been credited or repaid in cash. Section 609 (b) states that a credit of an overpayment against any tax shall be void if a "refund" of such overpayment would be considered erroneous under Section 608. Here, as in Section 607, the word "refund" is used to mean "repaid in cash". Section 322 (a) of the 1928 Act (infra p. 34) provides that overpayments shall first be credited against other taxes due, and the balance be "refunded." As here used, again, the meaning is "repaid in cash."

In which of these two senses is the word "refund" used in Section 610 (b)?

Respondent submits that it is there used, as in Section 608, as descriptive of the act of the Commissioner in determining that there has been an overpayment.

If the word is used in Section 610 to mean "repayment in cash" it must follow that the section is applicable only in instances where the overpayment has resulted in a repayment in cash. That Section 610 has no such narrow scope will appear from a reference to cases involving erroneous credits.

If it is determined by the Commissioner that any part of an amount which has been credited against other taxes due has been erroneously considered as an overpayment, then the Commissioner has two alternative remedies, depending on the facts, as follows:—

1. If the period of limitation for assessment of the tax against which the credit was applied has not expired, he may proceed with the determination of a deficiency and assessment in the usual way. *Burnet v. Porter*, 283 U. S. 230; *McIlhenny v. Com.*, 39 F. (2d) 356, and cases there cited, particularly *Austin Co. v. Com.*, 35 F. (2d) 910.

2. If the period of limitation for proposing a deficiency has expired, the Government may sue under Section 610, *Western Wholesale Drug Co. v. U. S.*, 47 F. (2d) 770, and this Section now affords the exclusive remedy, *Hartford-Connecticut Trust Co. v. Eaton,* 8 Fed. Supp. 218.

Clearly, then, Section 610 includes within its scope all actions to recover erroneous "refunds" including those which have been accomplished by credit as well as those which have been accomplished by repayment in cash. The word is there used to describe the act of the Commissioner in determining that there has been an overpayment. This act itself is the "refund" and, as will be more fully developed, it occurs when the Commissioner signs the Schedule of Overassessments.

B.

In view of this meaning of the word "refund", as used in Section 610 (b), the question naturally arises, when would the period start in cases where the refund has taken the form of a credit? This, in turn, under the Government's theory, involves the question whether the application of a credit constitutes payment, and if so, on what date it occurs.

The collection of a tax due for one year by credit of a refund or overpayment for another year constitutes payment of the tax against which the credit is made just as effectively as if the refund had been paid in cash and in turn paid by the taxpayer to the Collector. "When the collector applied part of the money, which was due on the refund, to another tax, the relation of plaintiff and defendant to the transaction so far as this question is concerned (application of Sections 609 and 610 of the 1928 Act) was in law the same as if the Collector had received cash from the plaintiff." *Boston Pressed Metal Co. v. U. S.*, 42 F. (2d) 312 (1930) (Ct. of Cl.), aff'd, 282 U. S. 409. To the same effect

are *U. S. v. Swift & Co.*, 282 U. S. 468 (1931); *U. S. v. Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6th); *Consolidated Paper Co. v. U. S.*, 59 F. (2d) 281 (Ct. Cl.); *Western Wholesale Drug Co. v. U. S.*, 47 F. (2d) 770 (D. C. So. Calif.); and *Jenkins S. S. Co. v. Routzahn*, 46 F. (2d) 548 (D. C. North. Ohio), wherein the court states, "When the government withheld the money and applied it in satisfaction of the penalty, it effected collection of the penalty exactly as if it had received plaintiff's check." And in *McEachern v. Rose*, 58 S. Ct. 84, No. 6, present term, decided Nov. 8, 1937, this court again recognized that the application of a credit is the payment of the tax against which the credit is applied.

To be consistent with its position in the present case, and in view of the fact that a credit is payment, the Government must contend that in the case of a credit the two year period starts from the date the payment is thus constructively made to the taxpayer. When does such constructive payment occur?

Under the decisions of this court payment through the application of a credit occurs when the Commissioner signs the Schedule of Overassessments.

In *U. S. v. Swift & Co.*, supra, the taxpayer filed a claim for refund of an amount which it had not paid in cash but which consisted of a credit of an amount overpaid for other taxable years. Section 252 of the Revenue Act of 1921 provided that overpayments be credited against taxes due, and the balance refunded. Section 284 (b) (1) of the Revenue Act of 1926 provided "no such credit or refund shall be allowed or made after . . . four years from the time the tax was *paid* . . . unless before the expiration of such period a claim therefor is filed by the taxpayer: . . ." (italics ours). The question was whether the refund claim was filed in time, and this depended upon the time when the application of the credit became effective as *payment*. This court held that *payment* of the tax against which the credit was applied occurred when the Commissioner signed the sched-

ule of refunds and credits. The practice has since changed, and the Commissioner no longer signs the schedule of refunds and credits. Under the practice prevailing throughout this case, the corresponding act is the signing of the Schedule of Overassessments.

In *McEachern v. Rose,* supra, one of the questions before this court was whether credits for overpayments of tax for certain years could be applied against taxes due for a preceding year where it appeared that recovery of the tax for such preceding year was barred. In the course of its opinion this court states:

> "Both section 322 and section 609 contemplate that the time of credit of an overpayment in one year against tax for another is to be marked by some definite administrative action. This Court, upon an examination of the established practice in the Bureau of Internal Revenue, concluded that the time of allowance of a refund and the time of credit of an overpayment against a tax due, is the date of approval by the Commissioner of the schedule of refunds and credits prepared by the collector, showing the amount due the taxpayer, rather than the earlier date of the certification by the Commissioner to the collector, of the schedule of overassessments. See United States v. Swift & Company, 282 U. S. 468, 51 S. Ct. 202, 75 L. Ed. 464; Girard Trust Company v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524. We accordingly held that approval of the schedule of refunds and credits fixes the date from which interest is allowed upon any balance refunded to the taxpayer, Girard Trust Company v. United States, supra, and the date from which the statute of limitations runs against the taxpayer's right to demand refund of a tax paid by the allowance of a credit. United States v. Swift & Company, supra.
>
> "After these decisions section 1104 of the Revenue Act of 1932, c. 209, 47 Stat. 287 (26 U. S. C. A.

Sec. 1670 (3), changed the date which should be deemed to be the time of allowance of the credit or refund within the meaning of that and earlier revenue laws. It provided that: 'Where the Commissioner has (before or after the enactment of this Act (June 6, 1932)) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act (the Revenue Act of 1932), or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax.'

"The date of the claim for refund and the date of the allowance of the credit which, according to section 1104, was that of the approval by the Commissioner of the schedule of overassessments, came after recovery of the 1928 tax was barred. If petitioner had then paid the tax he could have recovered it back as an overpayment under section 607; accordingly, credit against the tax of the 1929 overpayment is prohibited by section 609, as are like credits for the overpayments of 1930 and 1931."

It follows, then, that the application of a credit is payment of the tax to which it is applied, and that such payment occurs when the Commissioner signs the Schedule of Overassessments. Thus, even assuming the full application of the Government's own contention which places such conclusive weight on the date of payment, under these decisions, in the case of a credit, the two year period of Section 610 (b) would start from the date of the signing of the Schedule of Overassessments because, in the case of a credit, that act fixes the date of payment.

Is a distinction to be made in this respect between refunds which have resulted in credits and refunds which have resulted in payments? Assume the case, of common occurrence, where a refund has been applied in part as a

credit and the balance as a payment. Should the two year period start from the signing of the Schedule of Overassessments with respect to the portion credited, but not until the date of actual payment with respect to the balance of the refund?

This is precisely the sort of inconsistency which this court has already condemned. In *Girard Trust Co. v. U. S.*, 270 U. S. 163, the question arose as to the interpretation of the Revenue Act of 1921 which provided that, upon the allowance of a claim for refund, interest shall be allowed and paid "to the date of such allowance." This Court held that the date in question was not the date of actual repayment, nor the date on which the Commissioner first decides that there has been an overassessment and refers the matter to the Collector for examination and report, but the date on which the Commissioner approves the amount thus ascertained for payment. In *U. S. v. Swift & Co., supra*, as already stated, it was necessary to determine the date of the allowance of a credit in order to determine the date from which the statute of limitations runs against the taxpayer's right to demand refund.

The Government, in the Swift case, sought to differentiate the Girard case on the ground that there the date of the allowance of a refund was in question; whereas, the Swift case involved the allowance of a credit. In denying that any such distinction exists the court states:

> "This construction" (i. e., the court's) "of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous."

C.

Let us next consider the meaning of the word "making" as used in Section 610 (b). Respondent readily concedes that the phrase "making of such refund", when the remainder of the text of the section and of the Revenue Act is ignored, could mean "payment of such refund", pro-

vided "refund" is taken to mean the same as "repayment in cash". But here, again, any such abstract examination of the phrase seems entirely unwarranted. We have already shown that "refund" as used in Section 610 (b) refers to the fact of overpayment, and the determination of such fact by the Commissioner,—it refers to a fact with respect to which actual payment to the taxpayer may be the consequence, or may not be the consequence as in the case of credits. When the word "refund" is understood as having this meaning the word "making" becomes meaningless when construed as "payment".

Variations of the word "made" are found in numerous other sections of the Revenue Acts dealing with various phases of refunds and credits and which have been interpreted by this and lower courts. We now refer to such other sections not merely as haphazard instances where the words in question are used in the same sense that respondent ascribes to them in Section 610 (b), but, what is more important, to demonstrate additional situations where the Government's construction would bring Section 610 (b) into conflict with the operation and purpose of such other sections.

Respondent submits that there is no distinction in point of time between the "making" and the "allowance" of a refund which may later result in credit or payment.

Section 322 (b) (1) of the Revenue Act of 1932 provides,

> "Section 322. Refunds and Credits.
>
> (b) Limitation on Allowance.
>
> (1) Period of Limitation.—No such credit or refund shall be *allowed or made* after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer." (These provisions were changed by amendment in 1934, but the changes in no way affect the point under discussion. Italics are ours.)

Section 1104 of the 1932 Act, infra p. , fixes the "date of *allowance* of refund or credit" as the date when the Commissioner first signs the schedule.

The Senate Finance Committee explains, infra p. 40, that the purpose of enacting Section 1104 was not only to clarify the date in question in view of the change in the administrative procedure, but also to protect taxpayers who might not be aware of their right to a refund in time to file their claim within two years after the tax was paid. Under Section 322 (b) (1), just quoted, either the taxpayer must file his claim within two years after the tax is paid or the Commissioner must *make* the refund within that period. If the purpose of Section 1104 is to permit the Commissioner to accomplish a refund at the earlier date by signing the schedule (and the Senate Finance Committee Report declares this to be the purpose) and thus favor small taxpayers who might not be aware of their rights, then it must follow that a refund is "made" when it is "allowed". A contrary construction would nullify the purpose of Section 1104 by postponing the "making" of the refund until the later date when payment occurs, and the effect of Section 1104 as desired and intended by Congress would thus be lost, because it might then be too late legally to make the refund. Such a contrary construction should be avoided, as a statute should be construed in a sense that will effect the legislative purpose: *U. S. v. Katz*, 271 U. S. 354. The intent of Congress is the goal of inquiry in interpreting statutes: *Hughes v. Commissioner*, 38 F. (2d) 755. Committee Reports in explanation of the purpose and design of specific provisions of the Revenue Acts are considered as deserving of peculiar authority in the construction of such provisions: *Hecht v. Malley*, 265 U. S. 144; and reference is frequently made to them, *Burnet v. S. & L. Building Corp.*, 288 U. S. 406.

Section 322 (b) of the Revenue Act of 1934 (with immaterial exceptions the same as in Revenue Acts of 1928 and 1932) provides in part:

"(1) . . . No credit or refund shall be *allowed* or *made* after two years from the time the tax was paid . . .

"(2) The amount of the credit or refund shall not exceed the portion of the tax paid . . . during the three (two years, prior to 1934) years immediately preceding the *allowance* of the credit or refund."

Section 322 (d) provides, in part:

"(d) . . . No such credit or refund shall be *made* of any portion of the tax unless . . . etc." (Italics ours)

From the foregoing it seems that, generally speaking, credits are "allowed" and refunds are "made". In the single section just quoted, credits are referred to as being "allowed" and refunds as "made"; both credits and refunds are then referred to as "allowed"; and finally, both are referred to as being "made". The conclusion is irresistible that the words are used interchangeably and entirely without any distinction in meaning.

Section 322 (b) of the Revenue Act of 1934 further provides that unless a claim for credit or refund is filed within three years after the return was filed or within two years after the tax was paid no credit or refund shall be "allowed or made" after the expiration of whichever of such periods expires the later. It cannot be argued sensibly that, for purposes of refunds which result in credits, the elapsed time is to be measured up to the date when the Commissioner signs the schedule of overassessments, but for purposes of refunds which result in repayments it is to be measured up to the date of the refund check or the date when it is delivered or paid. This is an additional instance of inconsistency of precisely the same sort condemned by this court in *U. S. v. Swift & Co., supra.* A statute should be construed, if possible, in a way that

avoids absurd or illogical consequences, *In re Blalock*, 31 F. (2d) 612 (1929), and in the sense that best harmonizes with all other parts of the statute, *United States v. Baltimore & Ohio Ry. Co.*, 159 Fed. 33, decree modified in other respects 220 U. S. 4 (1911).

Perhaps even more conclusive proof in support of respondent's contention is found by reference to Section 608 of the Revenue Act of 1928.

As previously shown, where payment of the tax for which the refund claim is filed has been accomplished through application of a credit, the time starts against the taxpayer on the date when the Schedule of Overassessments was signed. Also, where no claim for refund was filed, the signing of the Schedule of Overassessments before the time expires for filing the refund claims satisfies the mandate of the statute that the credit or refund be "allowed or made" before the expiration of that period. To supplement this, Section 608 of the 1928 Act, defining certain types of erroneous refunds provides, inter alia, "A *refund* . . . shall be considered erroneous . . . if *made* after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed . . .". Assume the case where a Schedule of Overassessments is signed on March 10; the time for filing a refund claim expires March 15; no refund claim was filed; the taxpayer owes no other tax; and the refund check has not been delivered. According to respondent's construction, the subsequent delivery and payment of the refund check after March 15 would not result in an "erroneous refund" for which the United States could bring suit under Section 610, notwithstanding the fact that under Section 608 any "refund . . . made" after March 15 would be an "erroneous refund". Under the Government's construction, although the "refund" was "made" on March 10 for purposes of satisfying the time requirement of Section 322 (b) (1), still, payment after March 15 would render the same refund erroneous under Section 608,

and suit could then be instituted under Section 610. This illogical consequence must follow unless some further distinction is to be made between the meaning of "refund" and "made" as used in Section 608, and the same words used in Section 610. Respondent believes that all of the various sections discussed in this brief are *in pari materia* and are inter-related because they deal with various phases of overpayments. The Government claims that Section 1104 of the 1932 Act, and perhaps Section 322 of the 1928 and 1932 Acts, are not *in pari materia* with Section 610 of the 1928 Act. Whichever of these opposed views may be correct, there can be no doubt whatever that Sections 608 and 610 of the 1928 Act are *in pari materia*. In fact, Section 610 (a) and (b) both refer in specific terms to Section 608. Nor can there be any doubt that the words in question are used in the same sense in both of these sections.

With the exception of the Paulson decision, discussed hereafter, the cases consistently hold that credits and refunds are allowed or made as a result of the same administrative act, and that in either case this occurs when the Commissioner officially approves the amounts to be credited or refunded.

In *Girard Trust Co. v. U. S., supra*, in holding that where interest on a refund is to be allowed to the date of the allowance of the claim, it is to be computed to date when the Commissioner approves the amount to be repaid, states, at p. 169,

> "If Congress had intended that interest should be allowed to the date of payment, it seems to us it would have said so."

Similarly, if Congress had intended that the period provided in Section 610 of the Revenue Act of 1928 should begin on the date when the refund check is issued, or when it is delivered, it seems that it would have said so.

Elsewhere in the Revenue Act Congress has chosen to make itself perfectly clear on that point. Section 614 of the Revenue Act of 1928 (still in effect) provides:

"Section 614. Interest on Overpayments.

"(a) Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * * * * *

"(2) In the case of a refund, from the date of the overpayment *to a date preceding the date of the refund check* by not more than 30 days, such date to be determined by the Commissioner.

* * * * * * * *

"(d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any *credit taken or refund paid* after the expiration of such period, even though allowed prior thereto."

(Italics ours)

Here Congress has made its meaning clear by resorting specifically to the date of the refund check, and by referring to this date as the date when the refund is *paid*.

Thus, not only is the construction of the word "made" as urged by respondent wholly consistent with other provisions of the Act where its meaning is now beyond question, but Congress has chosen wholly different words to describe a date which occurs after the credit or refund is allowed or made. Clearly, the expression "credits or refunds allowed or made", which is used so frequently throughout the statute, acquires a definite meaning when contrasted with the expression "credit taken or refund paid" as found in 614 (d) of the Revenue Act of 1928, supra.

An additional instance of the same character is found in the very section under discussion as amended by Section 803 of the Revenue Act of 1936. This section of the 1936 Act provides:

"Section 803. Interest on Erroneous Refunds.

"(a) Section 610 of the Revenue Act of 1928, as amended, is amended by adding at the end thereof a new section to read as follows:

'(d) Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum from *the date of the payment of the refund.*' "
(Italics ours)

Surely, according to established principles of statutory construction this change in phraseology in the same section from the word "making" to the word "payment" clearly imports a difference in meaning. The distinction becomes all the more significant when it is considered that both words are used for fixing the date from which certain periods of time are to be calculated,—in the one case to determine when the action must be started, and in the other to determine from what date interest runs. These dates were not intended to be the same, because different words are used to describe them.

The Government cites two instances in which the word "made" or some variation of it is used in the sense of "paid". One such instance is found in the Report of the House Committee (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35) explaining the change from Section 1116 of the 1926 Act to Section 614 of the 1928 Act wherein it is stated:

"The principal change made in existing law is that in the case of a refund the interest period now terminates with the *allowance* of the refund, a date which often *precedes* the actual *making* of the refund

> by a considerable period of time and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30 days of the *date of the refund.*"
>
> (Italics supplied)

As here used, the word "making" is intended to be used in the sense of "payment", and in order to avoid confusion that might otherwise result, the author of the report has preceded the word "making" by the word "actual".

The second instance cited by the Government is Section 710 of the Revenue Act of 1928, which provides:

> "No *refund or credit* of any income, war-profits, excess-profits, estate or gift tax, in excess of $75,000, shall be *made* after the enactment of this Act, until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation. . . ."
>
> (Italics supplied.)

The Government in its brief, at p. 21, states that it is "informed" that the report is made to the Joint Committee on the date the Commissioner signs the Schedule of Overassessments; that this practice has the approval of the Joint Committee; and relies on this as showing that refunds and credits are not *made* until payment occurs, some time after the Schedule is signed.

It may be that here, again, the word "made" means "paid". The act sought to be forestalled until the 30 days had expired is the act of delivery of the certificate of overassessment accompanied by the refund check or indicating the credit. It will be observed that "refund" is used three times in this section in contradistinction to "credit", and therefore in the sense of "repaid in cash". As previously explained, when "made" is coupled with this meaning of "refund" it may mean "paid", as in this section. Furthermore, it would seem foolish to have such reports made to the Joint Committee until after the claims had been disposed of on their merits.

At most, the House Committee Report on Section 614 of the 1928 Act, and Section 710 of the 1928 Act, just discussed, are simply illustrations of instances where "made" happens to be used in a manner indicating that it means payment. In both instances, such meaning may be recognized as being fully consistent with the legislative purpose and without bringing the section into conflict and disharmony with other sections. By no means does it follow that the same meaning is to be carried over to other sections, such as 610 (b), where it is perfectly clear that the word or words are used in an entirely different sense, particularly where such other meaning serves the commendable purpose of certainty and of harmonizing all sections in which the words are used.

D.

Additional inconsistencies which would be avoided through adoption of respondent's contention will be observed by considering the successive periods of time between the original filing of the return and payment of the tax and the final suit to recover an amount which has been erroneously refunded by credit or by payment.

The taxpayer must file a claim for refund within three

years from the filing of the return or within two years after payment, whichever is the later. Section 322 (b) of the 1936 Act. Where no refund claim is filed by the taxpayer (as in the present case), the Commissioner may voluntarily determine that there has been an overpayment, but in such case the ensuing credit or refund must be allowed or made before the expiration of the time within which the taxpayer could file a claim. Section 322 (b) (1) of the 1936 Act; Section 1104 of the 1932 Act.

Since the act of the Commissioner in signing the Schedule of Overassessments is the only act required to be done before the period against the taxpayer has expired, it is natural and logical to expect that the next following period against the United States would start where the preceding period against taxpayers ended, and as a result of the same act. By its contention the Government would invest itself with the power to prolong indefinitely the beginning of the period, and thus inject a floating period of time which seems entirely foreign to the purpose of Section 610, and which would break the otherwise perfect continuity between the time the tax is paid and the expiration of the time within which the Government could sue to recover its erroneous refund. Under respondent's version, there is a beginning and an end fixed by the statute,—each successive time period starts where the preceding one left off. This imparts to the statute the highly desirable element of certainty. Under the Government's version the Commissioner could delay indefinitely in permitting the refund check or the certificate of overassessment to be delivered, although the claim had long since been approved on its merits. Furthermore, respondent's contention is more favorable to the Government than its own, from the point of view of administrative convenience. The time when the Schedule of Overassessments is approved is peculiarly within the knowledge of the Commissioner as it is a matter of record in his own office, and readily available at all times. It is a time certain. The

time when payment occurs is peculiarly within the knowledge of the taxpayer. The period in question runs against the Government,—not the taxpayer. Also, the time of payment is not a time certain. In the present case, the Government argued before the District Court that the date of the refund check controls. Before the Circuit Court it argued that the date of the delivery of the refund check is the controlling date. Before this court it is arguing that it is the date of "payment", whatever that may mean. Is the Commissioner to enquire from taxpayer when he received the check,—or ferret out the check voucher to determine when it was cashed? This is not merely a question of repose to taxpayers. If it is appropriate for the Government to argue what the law should be instead of what the statute provides, then it is equally appropriate for respondent thus to point out that its contention would result both in greater administrative convenience and in greater certainty.

In this same connection, the Government urges the point that it is something akin to foolishness to suppose that the period of limitations in question starts before the taxpayer knows anything about what has taken place. But this is precisely the case in the converse situation. Where a tax due has been paid by the application of a credit the period against the taxpayer for filing a refund claim of such tax runs from the date the Schedule of Overassessments is signed. *U. S. v. Swift & Co.*, supra. If hardship is to be weighed, it seems the greater in such a case, because the controlling date is peculiarly within the knowledge of the Commissioner whereas the limitation is running against the taxpayer. Furthermore, according to the Government's version, Section 610 (b) should be construed in favor of the party making the mistake.

The case of *Paulson v. U. S.*, 78 F. (2d) 97, is contrary in its reasoning to respondent's contention and supports the contention of the Government. Both the District Court (R. p. 11) and the Circuit Court (R. p. 16) distin-

guish the Paulson case on the ground that the facts therein arose prior to the enactment of Section 1104 of the 1932 Act. The Circuit Court states that "Light is thrown upon the Congressional intent" by Section 1104 and that "Committee Reports of both Senate and House lend additional weight . . ." in favor of respondent's construction of Section 610. It seems immaterial now to consider whether the decision of the Circuit Court in this case is or is not in conflict with the Paulson decision. Respondent's position respecting the Paulson case is that for all of the reasons recited in this brief the case was wrongly decided, but that the court might have reached the opposite conclusion if Section 1104 had been applicable to the facts before it.

Respondent does not rely on Section 1104 of the 1932 Act in the sense that it amended Section 610 of the 1928 Act. The arguments advanced in this brief are equally applicable to the various sections of the Acts as they stood both before and after the enactment of Section 1104 in 1932. Section 1104 of the 1932 Act was enacted to give statutory recognition to the changed administrative practice under which the Commissioner no longer signs the Schedule of Refunds and Credits and under which the final act of the Commissioner in disposing of refund claims on their merits occurs when he signs the Schedule of Overassessments. But with or without Section 1104 respondent submits that, for the reasons herein discussed, the period in question starts from that date.

ANY DOUBT AS TO THE MEANING OF SECTION 610 SHOULD BE RESOLVED IN FAVOR OF THE TAXPAYER.

Respondent believes that the limitation period clearly starts with the signing of the Schedule of Overassessments. But if this court entertains any doubts on the subject, respondent submits that such doubt should be resolved in its favor.

United States v. Updike, 281 U. S. 489 (1930), involves an interpretation of Section 278 (d) of the Revenue Act of 1926 relating to the limitations on the bringing of suits by the Government after assessment. In holding that the suit in question was barred the court states, at p. 496:

> ". . . We think this is the fair interpretation of the clause, and one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitations embodied therein*, to be construed liberally in favor of the taxpayer. *Bowers v. New York & Albany Co.*, 273 U. S. 346, 350."
>
> (Italics ours.)

And in *United States v. Steel Furniture Co.*, 74 F. (2d) 744, (C. C. A. 6th Cir.) (1935), referring specifically to Section 610 of the Revenue Act of 1928, the court states:

> "The statute was evidently enacted to grant taxpayers repose from suits for erroneous refunds made by the Government. *Being a part of a taxing act, it is to be given a liberal construction in favor of the taxpayer.* W. P. Brown & Sons Lumber Co. v. Commissioner, 38 F. (2d) 425, 428, so far as it is to be construed as holding differently, must be deemed to have been overruled by Bowers v. New York & Albany Co., 273 U. S. 346, 350, and United States v. Updike, 281 U. S. 489, 496."
>
> (Italics ours.)

Taxpayer recognizes the established general principle of law that statutory provisions derogatory to sovereign rights must be construed strictly in favor of the sovereign, *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120 (1886); *duPont De Nemours & Co. v. Davis*, 264 U. S. 552 (1924). But these cases do not involve federal revenue laws. As shown by *U. S. v. Updike* and *U. S. v. Steel Furniture Co., supra*, the rule is the contrary where the statute in question is a part of a revenue measure.

Respondent submits that the rule favoring the taxpayer is no less applicable merely because prior to the enactment of Section 610 of the 1928 Act the Government had a right of action to recover money paid out of the public treasury as a result of a mistake of fact or law. That remedy was not limited in its scope to the recovery of taxes erroneously refunded by credit or in cash. Whatever that remedy was prior to the enactment of Section 610, the remedy is now exclusively statutory in all cases where the Government seeks to recover a ". . . tax . . . which has been erroneously refunded . . ." (Section 610 (b)). *Hartford-Connecticut Trust Co. v. Eaton*, supra. The present suit was instituted under Section 610 (b) which, as stressed throughout this brief, should be recognized for what it is, —an integral part of a Revenue Act.

In the *Updike* case, which respondent submits controls in its favor the question under discussion, the suit was against stockholders as transferees of the assets of a dissolved corporation taxpayer which had failed to make a return for the period of 1917 prior to dissolution in the manner prescribed by a certain regulation promulgated under the Revenue Act of 1917. The suit was brought more than six years after assessment, and the question was whether it was barred by the following provisions of Section 278 of the 1926 Act:—

> "(a) In the case . . . of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> • • • • • • • • •
>
> "(d) Where the assessment . . . has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within

six years after the assessment of the tax. . . . U. S. C. Supp., Title 26, Sections 1058, 1061."

The Government contended that the above quoted section was confined in its scope and application to suits to collect taxes *qua* taxes, since, by its terms, it states that "such taxes may be collected, etc." whereas the suit at issue was one to recover "trust funds". In denying this distinction under the facts before it, this court stated, at p. 494:

> "It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from Section 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of Section 278 (d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

Similarly, in the present case, since the suit is brought to recover a "tax . . . which has been erroneously refunded", how can it be said in the same breath that this is not a suit to recover a tax which has been erroneously refunded? Certainly it would be hard to convince such a person (as the defendant) that he had not paid a tax.

Respondent submits that the reason for the rule favoring the taxpayer is fully present.

CONCLUSION.

The judgment of the court below should be affirmed.

Respectfully submitted,

SANFORD D. BEECHER,
CLAUDE C. SMITH,
Attorneys for Respondent.

ALVORD AND ALVORD,
ARCHIBALD T. JOHNSON, of
DUANE, MORRIS AND HECKSCHER,
Of Counsel.

APPENDIX A.

Revenue Act of 1921, c. 136, 42 Stat. 227:—

SEC. 252. REFUNDS.—That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer:

Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer:

Provided further, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any

previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section:

And provided further, That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. CREDITS AND REFUNDS.

* * * * * * * * *

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * * * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND. The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * * * * * *

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after May 29, 1928) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after May 29, 1928, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after May

29, 1928, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) CREDIT AGAINST BARRED DEFICIENCY. Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) CREDIT OF BARRED OVERPAYMENT. A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) APPLICATION OF SECTION. The provisions of this section shall apply to any credit made before or after May 29, 1928.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after May 29, 1928, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION.—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

* * * * * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be

credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * * * * * *

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * *

(b) LIMITATION ON ALLOWANCE.—

(1) PERIOD OF LIMITATION—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three

years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

* * * * * * * *

(d) OVERPAYMENT FOUND BY BOARD.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

APPENDIX B.

Excerpt from Committee Report:

S. Rep. No. 665, 72d Cong., 1st Sess., pp. 57-58:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allowance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of the small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can

make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 act.

SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1937.

The United States of America, Petitioner, *vs.* Robert K. Wurts.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 14, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Under the Revenue Act of 1928,[1] forbidding suit by the United States to recover an erroneous tax refund unless brought "within two years after the making of such refund," does the two year limitation begin when the refund is allowed or when it is paid?

The Court of Appeals affirmed[2] the District Court's judgment holding the Government barred by this limitation because the present suit was not brought within two years after the Commissioner allowed the refund by signing the schedule of over-assessments.

The facts show that:

March 15, 1932, the Commissioner erroneously approved a refund of taxes paid by respondent for the year 1929. April 30, 1932, a check was mailed to the taxpayer for this erroneous refund. April 26, 1934, more than two years after the allowance of the refund, but less than two years after actual payment, the Government brought this suit to recover the erroneous refund.

The Government by apropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid.[3] "No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, . . ." *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 401. Section 610 of the 1928 Act, relied upon as barring recovery of this erroneous and

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 610.

[2] 91 F. (2d) 547; certiorari granted, — U. S. —.

[3] Wisconsin Central Railroad *v.* United States, 164 U. S. 190, 212; see United States *v.* Burchard, 125 U. S. 176, 180, 181.

unwarranted tax refund, does not grant the Government a new right, but is a limitation of the Government's long-established right to sue for money wrongfully or erroneously paid from the public treasury. Ordinarily, recovery of Government funds, paid by mistake to one having no just right to keep the funds, is not barred by the passage of time.[4] There is no contention here that respondent has any right to retain this refund erroneously paid by the Government. His defense is that the statutory bar prevents recovery. The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has "clearly manifested its intention"[5] to raise a statutory barrier.

Section 610—urged by respondent as a statutory barrier—requires that the Government bring suit "before the expiration of two years *after the making of such* [*erroneous*] *refund.* . . ." Respondent contends that the Revenue Act of 1932[6] indicated Congressional intent to designate the date of *allowance* of a refund (the date the Commissioner signs the schedule of over-assessments) as the date of refund for computing the period of limitations under Section 610. The 1932 Act provides:

"Where the Commissioner has (before or after June 6, 1932) signed a schedule of over-assessments in respect of any internal revenue tax imposed by [the Revenue Act of 1932] or any prior Revenue Act, the date on which he first signs such schedule (if after May 28, 1928) shall be considered *as the date of allowance* of refund or credit in respect of such tax." This Act in no manner relates to limitations on suits for erroneous refunds. It has no purpose in common with Section 610 of the 1928 Act. The 1932 Act throws no light on the meaning of Section 610.

Section 610 is clear when its words are given their commonly accepted import. "Congress may well be supposed to have used language in accordance with the common understanding."[7] Webster's New International Dictionary (2d Ed., Unabridged) defines "refund" as "that which is refunded" and defines the transitive

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[4] Grand Trunk Western Railway Co. *v.* United States, 252 U. S. 112, 121.

[5] Compare, United States *v.* Nashville, etc., Railway Co., 118 U. S. 120, 125.

[6] Revenue Act of 1932, c. 209, 47 Stat. 169, Section 1104.

[7] Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343, 347.

verb as: "to return (money) in restitution, repayment . . ." Only by ignoring the common understanding of words could "making . . . (a) refund" be considered synonymous with "allowing a refund."

That Congress had in mind the separate and distinct meanings of these two expressions is clearly demonstrated in House Report No. 2, 70th Congress, 1st Session, pages 34, 35, containing the Commitee Report on the Revenue Act of 1928:

"The section (610) provides that any erroneous refund, . . . may be recovered by suit brought in the name of the United States if such suit is begun within two years *after the making of the refund.*"

Immediately following, in referring to Section 614, the Report stated:

"The principal change made in existing law is that in the case of a refund the interest period now terminates *with the allowance of the refund, a date which often precedes the actual making of the refund* . . ."

The Commissioner's signature on a schedule of over-assessments does not finally establish a claimant's right to a refund and does not preclude further investigation and consideration of the claim. The Commissioner could later take his signature from the schedule and as pointed out by this Court might—even after a check was signed and mailed—cancel the payment and revoke the authority of payment erroneously made.[8]

It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government had no right to sue this taxpayer to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made. As said by a House Committee in reporting on a statute of limitations contained in a revenue act,[9] "Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues."

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[8] Daube *v.* United States, 289 U. S. 367, 372.

[9] House Report No. 179, 68th Congress, 1st Session, page 27.

We are of opinion that Congress did not intend the limitations of Section 610 to run against the Government until the Government's right "has accrued in a shape to be effectually enforced."[10] This statute does not begin to run against the Government when a claim is erroneously allowed. It begins to run from the date of payment. The judgment below is not in accord with this construction of the statute and is

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] Cf., Borer v. Chapman, 119 U. S. 587, 602.